Commonwealth
OMBUDSMAN

Child Support Agency

ADMINISTRATION OF DEPARTURE PROHIBITION ORDER POWERS

June 2009

Report by the Commonwealth Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. 08|2009

Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

These reports are not always made publicly available. The Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report. Nevertheless, to the extent possible, reports by the Ombudsman are published in full or in an abridged version.

Copies or summaries of the reports are usually made available on the Ombudsman website at www.ombudsman.gov.au. Commencing in 2004, the reports prepared by the Ombudsman (in each of the roles mentioned above) are sequenced into a single annual series of reports.

ISBN 978 0 9805961 8 2

Date of publication: June 2009
Publisher: Commonwealth Ombudsman, Canberra Australia

Requests and enquiries can be directed to the Director Public Affairs, Commonwealth Ombudsman, GPO Box 442, Canberra ACT 2601; email ombudsman@ombudsman.gov.au or phone 1300 362 072 (calls from mobiles charged at mobile phone rates). This report is available on the Commonwealth Ombudsman's website http://www.ombudsman.gov.au.

CONTENTS

EXECUTIVE SUMMARY

In 2001, the Commonwealth Parliament gave the Child Support Agency (CSA) the power to make administrative orders preventing a person with an overdue child support debt from leaving Australia. The CSA's power to make a Departure Prohibition Order (DPO) is modelled closely on provisions contained in taxation legislation.

Child support collection figures for the period 2005 to 2008 would suggest that a DPO is an effective tool to assist the CSA to collect child support from a reluctant payer. However, the number of complaints to the Ombudsman concerning the CSA's use of its DPO powers has been growing since 2006. Our investigation of two of those complaints led us to question the circumstances in which the CSA was making DPOs. In particular, we were concerned that the CSA was routinely making DPOs in cases where the child support debtor's intended travel was of short duration. These people had significant ties with Australia, such as employment, family and property and there was nothing to suggest that they would dispose of, or hide, assets overseas. This was inconsistent with the way the Australian Taxation Office (ATO) administers its DPOs, despite similarities between the DPO provisions in child support and taxation legislation.

On 18 June 2008 the Ombudsman notified the CSA of our intention to conduct an own motion investigation into the CSA's administration of its DPO powers. This report sets out the findings of the investigation.

In summary, the report finds that:

- there are weaknesses in the CSA's policy and procedures for making DPOs
- CSA staff are not routinely following the CSA's policies and procedures in relation to DPOs.
- all of the cases which we reviewed revealed problems in CSA's decision-making, including some serious errors which could lead to the DPO being found to be invalid.

This report includes the results of our review of 21 CSA decisions to issue a DPO. The child support debts in question ranged from $1,000 to $76,000. The report also contains six case studies drawn from that sample. They were selected to illustrate a range of problems that were identified with the CSA's decision-making processes regarding DPOs.

A decision to issue a DPO and prevent a person from travelling overseas is a serious one, as it essentially impinges on their freedom of movement. The power to issue a DPO is a discretionary power that can only be exercised in limited circumstances: it is a power to be used appropriately. Parliament has authorised the CSA to make a DPO to prevent someone from leaving Australia if the CSA believes, on reasonable grounds, that it is desirable to do so to ensure the person does not leave Australia without paying their child support debt in full or making satisfactory arrangements to settle it over time. However, the Parliament has also prescribed additional compulsory criteria that must be met before the CSA can make a DPO.

Federal Court of Australia decisions have said that it is appropriate for the ATO to make a DPO only if the person's intended departure from Australia is likely to make

recovery of their taxation debt more difficult. During the course of this investigation we advised the CSA that we considered it should have regard to the case law about ATO DPOs in administering its own DPO provisions.

The CSA has informed us that it does not accept that its power to make a DPO is limited to the situation where the person's intended departure will jeopardise its ability to recover the child support debt. The CSA further considered and affirmed its view that it can make a DPO to encourage a reluctant payer to pay the child support that they are able to pay.

For the purposes of this report we accept that it is reasonable for the CSA to act on the basis of that view until such time as a court considers the question of the proper construction of the DPO provisions in the child support legislation. However, when making a DPO as a means to encourage a person to pay their child support, the CSA must adhere strictly to the legislative provisions that restrict the power to impose such orders. In effect those provisions require the CSA to take into account the totality of the person's individual circumstances, including the impact that the DPO will have on the person, the reasons why they are behind with their child support payments and their current financial situation. It is important that the CSA's policy and procedures guide staff to carefully balance the relevant considerations and that staff actually follow those procedures.

What we discovered during our investigation suggests that the CSA does not have the balance right at this time. The eight recommendations in Part 8 of the report should assist the CSA to improve its processes and the quality of its decisions.

The CSA's compliance strategy for 2008–10 includes an increased emphasis on the use of DPOs as a means of collecting child support, with a target to issue an additional 4,500 DPOs by 2010. It is questionable whether it is appropriate for the CSA to have such targets for matters of this type. This investigation would suggest that the focus of the CSA's attention should be on the quality of the processes associated with making a DPO, rather than the quantity of orders made.

As at 8 May 2009, the CSA had 1,004 DPOs in force. This report recommends that the CSA review all of these cases to ensure that its decision to issue a DPO was correct in the circumstances and that it is still appropriate. The report recommends that in future the CSA's notice to a person of its decision to make a DPO includes detailed advice about the person's options to challenge it, including their right to complain to the Ombudsman's office.

The CSA has made a number of changes to its processes for administering DPOs to address the deficiencies that we highlight in this report. Those improvements are detailed in Part 9.

PART 1—INTRODUCTION

1.1 Since 2001, the CSA has had the power to make an administrative DPO for people whose child support is registered with the CSA for collection and who are behind in their payments. A DPO is effectively a ban on a person leaving Australia. A DPO remains in force until the CSA revokes it or it is set aside by a court of competent jurisdiction. A child support debtor subject to a DPO may apply to the CSA for a Departure Authorisation Certificate (DAC), which, if issued, allows the debtor to temporarily depart Australia for a foreign country despite being subject to a DPO. In the absence of a DPO, a child support debtor is free to travel overseas, despite the fact that he or she may have unpaid child support.

1.2 When the CSA issues a DPO, the CSA notifies the debtor and the Australian Federal Police (AFP). The AFP records the details on a database that the Australian Customs Service (ACS) checks before it allows a person to leave Australia. It is an offence for a person to leave, or attempt to leave Australia knowing that a DPO has been made. Essentially, the CSA is responsible for issuing the DPO, with the AFP and ACS being responsible for enforcement of the scheme at international departure points around Australia-—by stopping people who attempt to leave after the CSA has made a DPO.

1.3 The Ombudsman's office has received a significant number of complaints concerning the CSA and DPOs. Some complaints were made by parents entitled to receive child support (payees) who were dissatisfied that the CSA had *not* made a DPO to prevent their former partner from travelling, or that the person had been able to leave Australia while a DPO was in place. However, the majority of complaints came from parents liable to pay child support (payers), who believed the CSA had unreasonably made a DPO in their case, or who were unhappy with what they perceived as the CSA 'threatening' to make a DPO if they did not pay their debt in full or increase the rate at which they were already repaying the debt.

1.4 A DPO is a significant restriction on a person's right to freedom of movement. It is therefore not surprising that the complaints we investigated showed that a DPO can be a powerful incentive for a person to pay their outstanding child support. However, a coercive power—such as the power to make a DPO—is one that must be exercised reasonably. The inappropriate use of a DPO could be oppressive or punitive. These factors, coupled with the CSA's public statements about its intention to increase the number of DPOs made, led the Ombudsman to conclude that it would be appropriate to initiate a broader investigation into the CSA's policies and procedures for making DPOs.

PART 2—THE CSA'S POWER TO MAKE A DPO

2.1 The CSA is a program within the Department of Human Services (DHS). The CSA's role is, firstly, to assess the rate of child support payable by a separated parent for the support of his or her child; and secondly, to collect amounts of child support (or child maintenance) that are registered with the CSA for collection.

Powers under the Child Support (Registration and Collection) Act

The CSA's collection powers

2.2 The CSA's collection activities are carried out under the *Child Support (Registration and Collection) Act 1988* (the CSRCA). The CSRCA gives the Registrar (also known as the CSA's General Manager) a range of powers to collect child support. These include coercive powers such as:

- giving a person (including but not limited to a child support debtor) a notice requiring them to provide information or documents, or attend an interview and answer questions (s 120 of the CSRCA)
- giving a notice to an employer to make deductions from the wages of a child support debtor (s 45 of the CSRCA)
- giving a notice to a third party (including but not limited to financial institutions such as banks) requiring them to pay an amount to the CSA that is otherwise due and payable to the debtor (s 72A of the CSRCA)
- requiring the ATO to pay a child support debtor's tax refund to the CSA (s 72 of the CSRCA)
- requiring Centrelink to make deductions from a child support debtor's social security pension or benefit (or in some cases, Family Tax Benefits) (ss 72AA and 72AB of the CSRCA)
- requiring the Department of Veterans' Affairs to make deductions from certain payments made to a child support debtor (s 72AC of the CSRCA).

2.3 The Registrar does not personally exercise all of these powers. Most CSA decisions are made by staff within the CSA via a system of written delegations and authorisations.[1] If a person does not pay their child support on time, the CSA will charge a penalty for late payment.[2] The CSA can also take court proceedings against a debtor to recover unpaid child support.[3]

2.4 However, even with these significant options for enforcing child support debts, the CSA has a substantial amount of overdue debt. As at 30 April 2009, the total amount of child support debt owed to the CSA was $1,067 million. It is important to remember that a payee does not receive child support from the CSA unless and until the CSA has collected this amount from the payer, so essentially, that is $1,067 million that payees are entitled to, but have not yet received.

---

1 The CSA has published these instruments of authorisation and delegation in *The Guide* chapter 6.1 at www.csa.gov.au/guidev2/TheGuideMaster.aspx?content=6_1_0.

2 See s 67 of the CSRCA.

3 See s 113 of the CSRCA.

2.5 As at 30 June 2008, the total outstanding debt was $1,103 million, which represented about 8.5% of all the child support debts registered with the CSA for collection since the start of the child support scheme. The CSA states that it has transferred $11 billion of the $12 billion registered for collection since the inception of the scheme, or 91.5% of total registered liabilities, as at 30 June 2008. The remaining $1,103 million comprises $778 million owed in domestic cases (where the parents and children are all located in Australia) and $235 million owed in international cases (where the children and payee, or the payer, are in another country).[4]

Administrative Departure Prohibition Orders

2.6 There is no common law or general rule that prevents a person with a child support debt from travelling overseas. However, since 30 June 2001, when Part VA of the CSRCA commenced, the CSA can make a DPO for a person whose child support is registered with the CSA for collection, where that person is behind with their payments.[5]

2.7 The CSA's power to make a DPO is discretionary. This means that the CSA can make a DPO, but is not obliged to do so. The discretion must be exercised in accordance with the relevant legislative requirements. There is a small number of senior officers within the CSA who are authorised to make a DPO, all of whom are Executive Level 2 and above. This is discussed further at paragraph 2.21 below.

Legislative requirements for DPOs

2.8 The CSA must exercise its discretion to issue a DPO in accordance with the requirements of s 72D of the CSRCA, which can be found in Appendix C to this report. The section authorises the CSA to make a DPO in relation to a person who has a child support liability, which includes anyone with an overdue debt to the CSA for child maintenance (payable under a court order or registered maintenance agreement or a child support assessment).[6] Additionally the CSA can make a DPO in relation to a person whose debt to the CSA arises from a court order requiring them to repay an amount of child support that they previously received from a payer who was later found not to be a parent of the child concerned (s72D(1)(c)(ii)). We understand that these parentage overpayment cases are quite rare and we have not received any complaints about DPOs made for such cases.

2.9 Apart from the requirement that the person has a child support liability, the Registrar or their delegate must be satisfied that all of the following compulsory factors are met:

- The person has not made arrangements satisfactory to the CSA to wholly discharge the debt (s72D(1)(b) of the CSRCA).
- The CSA is satisfied that the person has failed to pay their child support 'persistently and without reasonable grounds' (s72D(1)(c) of the CSRCA).
- The CSA believes on reasonable grounds that it is desirable to make the order to ensure that the debtor does not leave Australia without either paying the debt in full, or making arrangements satisfactory to the CSA to pay the debt in full (s 72D(1)(d)).

---

4 Deputy Secretary, DHS, in a letter to the Ombudsman dated 20 August 2008.

5 Part VA of the CSRCA inserted by the *Child Support Legislation Amendment Act 2001*, effective from 30 June 2001.

6 Section 72D(1)(a) of the CSRCA, as clarified by s 72E, and s 72(1)(c).

2.10 In deciding whether they are satisfied that the person has persistently and without reasonable grounds failed to pay their child support, the CSA Registrar or delegate must consider all the following factors:

- The debtor's capacity to pay the debt (s 72D(2)(a)).
- The number of occasions the CSA has taken recovery action and the outcome of that action (s 72D(2)(b)).
- The number of occasions when the person's regular child support payments were not paid by the due date (s 72D(2)(c)).[7]
- Any other matters the CSA considers appropriate (s 72D(2)(e)).

2.11 The Explanatory Memorandum for the Bill that introduced CSA DPOs states that the system would 'mirror closely the existing departure order system in place under the *Taxation Administration Act 1953'* (the TAA).[8] The relevant ATO provision is s 14S of the TAA. A comparison of the two provisions suggests that s 72D of the CSRCA reflects, in part, the language and structure of s 14S of the TAA, however, there are noteworthy differences between the CSA and ATO provisions.[9] In drafting s 72D of the CSRCA, the legislature departed significantly from s14S of the TAA by including two additional preconditions that must be met before a DPO can be made. Firstly, the CSA decision-maker must consider whether the debtor has already made an arrangement satisfactory to the Registrar for the child support debt to be wholly discharged. Secondly, the CSA decision-maker must consider whether the debtor has persistently and unreasonably failed to pay their child support debt.[10] In considering this second precondition, the CSA decision-maker must take into account the factors listed in s 72D(2).

How often does the CSA use its DPO powers?

2.12 There were 1,004 CSA DPOs in force as at 8 May 2009.

2.13 In June 2008, the CSA released its new compliance strategy, which stated that the CSA would 'increase the number of cases where Departure Prohibition Orders are issued by 4,500 and expect to deliver an additional $25.8 million in child support payments by 2010'.[11]

2.14 On 23 December 2008, the CSA said it had had made 297 DPOs since July 2008, resulting in the collection of approximately $2.4 million.[12]

2.15 The CSA, as part of DHS, includes information in the DHS Annual Report about its performance. This includes the number of DPOs made each year and the amount of child support that it has collected as a result of making them. The CSA has

---

7 In the case of a child support debt arising from a parentage overpayment order registrable under s 17A of the CSRCA, CSA must consider the period that has elapsed since the person was ordered to repay the amount.

8 Schedule 6 of the Explanatory Memorandum to the *Child Support Legislation Amendment Bill No 2 2000.*

9 See Annex C for excerpts from the relevant legislation.

10 See s 72D(1)(b) and (c) of the CSRCA.

11 Australian Government Child Support Agency, *CSA: supporting parents to meet their child support responsibilities 2008–2010*, at p 23.

12 Senator the Hon Joe Ludwig (media release), *Child Support debt could stop your overseas holiday*, 23 December 2008.

advised us that DPO information in the first DHS Annual Report for 2006–07 was compiled manually.[13]

2.16 The CSA has subsequently introduced an automated reporting process and used this in the preparation of the DPO information in the DHS Annual Report for 2007–08.[14] The data obtained from this automated process also covers 2006–07. A comparison of the two sets of data for 2006–07 suggests that the CSA may previously have been underestimating the numbers of DPOs made and overestimating the child support collected.

2.17 The CSA has assured us that the discrepancy can be attributed to the different method of data collection. Whatever the reason, it is clear that any conclusions based on a comparison of the manually and automatically gathered data would not be safe, so we have confined the discussion below to the period covered by the CSA's automatically gathered data.

2.18 The following table shows the CSA's comparative average collection rate per DPO over the period 2006–08, as well as the projected rate based on the targets included in the CSA's compliance strategy. It should be noted that the CSA has not necessarily collected more child support as a direct result of every DPO made.

Period	Number of DPOs	Total $ collected	Average per DPO
2006–07	846	$4.1 million	$4,846[15]
2007–08	924	$5.7 million	$6,169[16]
1 July 2008 to 30 April 2009	924	$4,236,812	$4,585[17]
2008–10 (target)	4,500	$25.8 million	$5,733

2.19 The amount that the CSA has collected using its DPO powers is not insignificant. However, it is useful to consider this in the context of the overall unpaid child support debt. The CSA reports that it collected $9.8 million via DPOs in the period from 1 July 2006 to 30 June 2008. If the CSA had not issued these DPOs, and presuming that it would not have been able to collect the money through other means, the total child support debt outstanding as at 30 June 2008 would have been $1,112.8 million, an increase of less than 1%.

The CSA's policy and procedures about DPOs

2.20 The CSA has published its policy about when it will make a DPO on its website, in chapter 5.2.10 of its online policy manual, *The Guide.*[18] The CSA has also

13 *Department of Human Services, Annual Report 2006–07* at: www.dhs.gov.au/dhs/publications/annual-reports/0607/043-output-2-csa/050-performance/050-improved-collection.html

14 *Department of Human Services, Annual Report 2007–08 at:* www.dhs.gov.au/dhs/publications/annual-reports/0708/part3/performance/improved-collection.html

15 Ibid.

16 Ibid.

17 CSA monthly compliance activity report, as at 30 April 09.

developed an internal procedural instruction (PI) which sets out the steps that the CSA will take when considering whether to make a DPO.[19] The PI also contains examples and further detail about the policy statements in *The Guide*.

2.21 When we commenced this investigation, the CSA's General Manager had delegated their DPO power to the following officers within the CSA: [20]

- Deputy General Managers (SES Band 2)
- Branch Head, Service Quality and Support Group (SES Band 1)
- State Managers (SES Band 1)
- Service Delivery Managers (Executive Level 2)

2.22 This small pool of senior delegates will usually make their decision after considering a submission or recommendation prepared by a more junior CSA officer, who has carried out an investigation of the individual circumstances of the child support debtor. The PI contains a template for the investigating officer to use when preparing the submission. During the course of our investigation, in response to concerns that we identified about the quality and accuracy of the CSA's DPO decisions, the CSA decided to centralise the DPO function and reduce the number of officers making DPO decisions. As at 8 April 2009, the power to make a DPO is delegated to the following officers within CSA:

- Deputy General-Manager, Service Delivery (SES Band 2)
- Assistant General-Manager, Enforcement Services (SES Band 1)
- Executive Level 2 officers in Enforcement Services

2.23 The remainder of this report spells out the concerns held by the Ombudsman's office regarding the CSA's views about the circumstances in which it is appropriate for it to make a DPO. In summary, there are two general concerns.

2.24 Firstly, our investigation revealed that the CSA's current policy and procedure documents in relation to the DPO power do not provide CSA officers with sufficient guidance to understand the complexity of section 72D, or to identify and balance all of the relevant considerations on a case-by-case basis.

2.25 Secondly, our investigation revealed that CSA officers do not consistently adhere to existing DPO policy and procedure, whether it is Customer Service Officers drafting submissions to the delegate or the delegate making a decision on the basis of such a submission.

2.26 Making a DPO is a serious limitation on a person's freedom of movement. Given the narrow interpretation that the Federal Court has given to the ATO DPO power (discussed in Part 6 of this report) it is reasonable to assume the courts will expect strict compliance with the CSA DPO provisions.

---

18 See www.csa.gov.au/guidev2/TheGuideMaster.aspx?content=5_2_10, Version 2.0 dated, release date 17 March 2008.

19 *PI—Departure Prohibition Orders and Departure Authorisation Certificates*, Version 2.0, release date 22 December 2006.

20 The CSA has published the current instrument of delegation on its website at http://www.csa.gov.au/guidev2/Resources/pdf/GMGenDelegIns.pdf

PART 3—OPTIONS FOR CHALLENGING A DPO

3.1 Most CSA decisions can be challenged through internal and external administrative review processes. The CSA's objection process encompasses an internal review mechanism, and the Social Security Appeals Tribunal (SSAT) as the external review body for CSA decisions. However, a decision to make a DPO cannot be challenged through these mechanisms because it is not included in the list of decisions to which a person may object in s 80(1) of the CSRCA. A person's right to apply to the SSAT only arises after the CSA has made a decision on an objection to the particular decision. Accordingly, DPO decisions are excluded from the usual scrutiny of general CSA decisions.

CSA's internal complaints process

3.2 The CSA has a three step internal complaints process, which can be used to question a DPO. A complaint can be made by telephone. The first step of the complaint process involves the person talking to the CSA officer dealing with their case. If not satisfied with the response to the complaint, the person can then ask to speak to the CSA officer's supervisor. The third level of the complaint process is to contact the CSA's complaints line, where a dedicated complaints officer will consider whether the CSA has properly dealt with the case, according to its usual procedures. The CSA's complaints officers generally consider a complaint from the perspective of whether the CSA has provided an appropriate level of service in the particular case. It is not their usual role to reconsider a disputed decision.

Applying for revocation of the DPO

3.3 A person can apply to the CSA for revocation of the DPO.[21] The CSA is obliged to revoke a DPO if the person no longer has a child support liability; if the person has made arrangements satisfactory to the CSA to wholly discharge the debt; or if the CSA is satisfied that the debt is completely irrecoverable.[22] The CSA also has a residual discretion to revoke a DPO in other circumstances where it considers it 'desirable to do so'.[23] Our experience in investigating complaints about DPOs is that the CSA is unwilling to revoke a DPO unless the payer has made arrangements satisfactory to the CSA to wholly discharge the debt.

Applying for a Departure Authorisation Certificate

3.4 A person can also apply to the CSA for a Departure Authorisation Certificate (DAC).[24] The DAC allows a person to depart Australia within a specified period, despite the existence of a DPO. The limited circumstances in which the CSA can issue a DAC are set out in s 72L of the CSRCA. In most cases, the CSA will require the person to pay a substantial amount as security for their return to Australia as one of the conditions for issuing a DAC.[25]

3.5 There is no requirement that the person make a payment towards their debt, nor that they enter into a satisfactory payment arrangement in order for the CSA to issue a DAC. Nor does s 72L confer authority on the CSA to impose such conditions. If the person can provide appropriate security, and the CSA is satisfied that they are

21 See s 72I(4)(a) of the CSRCA.
22 See s 72I(1) of the CSRCA.
23 See s 72I(3) of the CSRCA.
24 See s 72K of the CSRCA.
25 See s 72M of the CSRCA.

likely to return to Australia, the practice of the CSA is to issue a DAC. If the person returns to Australia by the required date, the CSA will return the security to them.

3.6 While the DAC arrangements clearly ameliorate the harshness of a DPO, they also appear to undermine the DPO's effectiveness as a means of enforcing a reluctant payer to pay, as the following case study shows.

Case study

In May 2006, the CSA implemented a DPO, which prevented Mr V from leaving Australia. At the time the DPO was made, Mr V's child support debt was approximately $43,000.

The payee, Ms W, complained to this office that despite the existence of the DPO, Mr V had not made any child support payments and on several occasions, the CSA had issued DACs, which allowed Mr V to leave Australia.

Our investigation revealed that over an 18 month period, the CSA had issued five DACs to Mr V, after he had provided a $5,000 security bond to the CSA. On each occasion, Mr V returned to Australia by the agreed date and the bond was returned.

The CSA has not been able to locate any source of funds that it can use to collect child support from Mr V. It has not negotiated an arrangement for regular payment of child support. It has not commenced legal action to recover the debt. The DPO appears not to have increased the CSA's chances of collecting child support in this case.

Administrative Appeals Tribunal

3.7 The Administrative Appeals Tribunal (AAT) does not have jurisdiction to review the CSA's decision to make a DPO. However, a person can apply to the AAT for review of the CSA's decision to refuse to revoke a DPO, a decision to refuse to issue a DAC, or a decision about security for the person's return to Australia.[26] At the time of our investigation, the CSA's standard letter advising a person that the CSA has made a DPO did not advise them of their right to apply to the CSA for a DAC, or for revocation of the DPO, nor of the AAT's jurisdiction to review those decisions.

Appealing to a court

3.8 A person aggrieved by the CSA's decision to make a DPO can appeal to court against that decision under s 72Q of the CSRCA. At the time of our investigation, the CSA's standard letter advising a person that the CSA has made a DPO advised the person of their right to appeal to the Federal Court about the DPO.

3.9 The courts with jurisdiction to hear a DPO appeal are the Federal Court and the Federal Magistrates Court. As far as we are aware, there have been only three such appeals.[27] The first appeal was settled by consent, with the CSA deciding to revoke the DPO. The second and third appeals were decided in favour of the CSA, with the result that the DPO remained in force.

3.10 Another court option open to a person is to seek judicial review of a decision to make a DPO under the *Administrative Decisions (Judicial Review) Act 1977*, in either the Federal Court or the Federal Magistrates Court.

---

[26] See s 72T of the CSRCA.

[27] *Watts v Child Support Registrar* [2007] MLC 423/7; *Albaugh v Child Support Registrar* [2007] FMCAfam1106; and *Russo and Child Support Registrar* [2009] FMCAfam 437.

Complaint to the Commonwealth Ombudsman

3.11 The Commonwealth Ombudsman has jurisdiction to investigate a matter of administration, such as a complaint about the CSA making a DPO. At the conclusion of an investigation, the Ombudsman can recommend that an agency, such as the CSA, take a particular action by way of a remedy for administrative action that the Ombudsman considers was contrary to law, unreasonable, or in all the circumstances, wrong.[28] The Ombudsman's recommendation is not binding upon the CSA in the same way as a court decision on an appeal. However, that is balanced by the strong investigative powers of the Ombudsman. The Ombudsman can report publicly on the results of the investigation, including whether the agency has implemented the recommendations.[29] The Ombudsman also has a broad discretion in deciding how to investigate the complaint. This could include looking beyond the specifics of the complaint in a particular case, such as by making an assessment of the adequacy of the agency's policy and procedures.

3.12 At the time of our investigation, the CSA's standard letter advising a person that the CSA has made a DPO did not advise that person of their right to complain to the Ombudsman about the CSA's administrative action.

[28] See s 15 of the *Ombudsman Act 1976.*
[29] See s 15 of the *Ombudsman Act 1976*.

PART 4—OMBUDSMAN'S INVESTIGATION

4.1 On 18 June 2008, the Ombudsman wrote to the CSA advising of the intention to investigate the CSA's administration of the DPO provisions in the CSRCA. The letter identified 21 cases where a complaint had been received about the CSA making or refusing to make a decision to issue a DPO, or about the CSA's administration of a DPO, once made. We asked the CSA for a copy of its written submission and decision to make a DPO in each of those cases and of the notice that it sent to the debtor in each case, advising that a DPO had been made. We also asked the CSA for copies of its internal procedures for making DPOs and the relevant instrument of delegation of the Registrar's power to make a DPO.

4.2 The CSA provided us with the requested policy and procedural documents and with the written decisions and letters for 18 of the specified cases. It advised us that it had not made a DPO in the three remaining cases. We subsequently asked the CSA to send us the decision and notice for three further DPO cases that we identified during our investigation, giving us a sample of 21 cases.

4.3 We reviewed the CSA's handling of each of those 21 cases by checking whether the CSA's decision in each of the cases had been recorded in the appropriate template, which is included in the CSA's procedural instruction for DPOs. We also checked whether the decision appeared to have been made in accordance with the CSA's own policy, as set out in *The Guide* and the DPO PI. We provided the preliminary results of our review to the CSA for its comments.

4.4 After considering the preliminary results of our review, the CSA advised us that it believed that we may have drawn incorrect conclusions for some of the cases. The CSA offered to provide us with additional information. The CSA informed us that the field on the customer computer screen in which the DPO decision is recorded has only limited space and for this reason, some of the relevant information had been omitted from the reasons for certain DPO decisions.

4.5 We met with the CSA to consider this additional material, some of which had not been included with the original data. Where it was apparent from the CSA's computer records that the additional information had been drawn to the attention of the decision maker, we accepted that this was part of the evidence they relied upon when deciding to issue the DPO. We have revised our conclusions about the cases in the light of the additional information. The results are set out in Table 1 at Annex A.

4.6 Table 1 shows the amount of the payer's child support debt at the time the CSA decided to issue a DPO. The lowest amount was $1,256. The highest amount was $76,669. Nine of the 21 DPOs were made in respect of child support debts of less than $10,000. This is consistent with the finding that the CSA's average rate of collection per DPO has been less than $10,000 since 1 July 2006.

Review of a sample of CSA DPO cases

4.7 In summary, Table 1 shows whether, in the opinion of this office, the CSA submission for each DPO adequately addressed the matters identified as relevant in the CSA's procedural instruction. This assessment was made on a simple Yes/No basis. In all cases, the CSA identified the fact that the payer had a child support debt and the amount of the debt. This met the requirement in s 72D(1)(a) of the CSRCA.

4.8 However, the CSA's PI says that rather than simply checking whether a person's child support account is in arrears, the CSA will 'ensure the liabilities that have created the debt are correct', by checking for things such as incomplete CSA action that could affect the debt; whether there are any disputes about the time the children spend with each parent; and whether the income figures used to calculate the assessment are accurate. The submissions indicated that this had been done in only 11 of the 21 cases (and only partially in four of those 11 cases).

4.9 We found other administrative deficiencies in all of the DPO submissions that we examined. The deficiencies in the CSA's records of the decision were such that we could not be satisfied that the CSA's decision to make a DPO was consistent with its own policy in any of the cases. Essentially, the record did not demonstrate that the CSA had properly considered whether each case met the three compulsory criteria for making a DPO in s 72D(1)(b) to (d) of the CSRCA (see paragraph 2.9 above). The information that the CSA provides to its staff about these criteria in the PI is set out below.

'The payer has not made satisfactory arrangements to fully discharge the liability—compliance'

4.10 The heading above appears in the CSA's PI, and is a paraphrase of the requirement in s 72D(1)(b) that 'the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged'. The CSA's PI says:

> What constitutes a satisfactory arrangement will depend upon the individual circumstances of each case. If a satisfactory arrangement is in place, CSA will not make a DPO.
>
> In normal circumstances, all other regular administrative avenues to collect the debt must be exhausted. If the debt can be collected through normal administrative options e.g. Employer withholding, issuing s 72A or 72B notices, irrespective of whether or not the debtor is in the country, then we may **not** issue a DPO. If all avenues have **not** been exhausted, the delegate must be made aware of this in the submission, including reasons why the order ought to be made.
>
> A satisfactory arrangement can include a realistic voluntary arrangement the payer has entered into and is complying with.
>
> **Note**: It is **not** essential that legal action be attempted before a DPO is made. It will need to be weighed up based upon the particular circumstances and merits of the case.

4.11 None of the 21 submissions that we reviewed indicated that the CSA had exhausted all administrative options before making a DPO. In many cases, the CSA was collecting child support through a payment arrangement, or through a notice served upon a person's employer or other third party. In some of these cases, there was no evidence to support a view that the payer had a capacity to pay the debt more quickly than was currently occurring. The submissions did not draw the delegate's attention to the reasons why it was appropriate to issue a DPO despite the fact that administrative options had not been exhausted.

4.12 Although the PI says that it is not essential for the CSA to attempt to recover the debt though litigation before issuing a DPO, it does suggest that this should be assessed according to the circumstances of the particular case. Our review of the 21 submissions did not suggest that CSA staff had considered whether litigation was an appropriate alternative to a DPO. The question of why the CSA had not taken legal action to collect the debt was addressed in only four of the 21 submissions. In two

further cases, the CSA had either commenced, or was planning to take legal action to collect the debt, but the DPO was considered an appropriate additional option.

'CSA is satisfied that the payer has persistently and without reasonable grounds failed to pay child support debts'

4.13 The heading above appears in the CSA's PI, and is a paraphrase of the requirement in s 72D(1)(c). The CSA's PI says:

> The payer must be a customer with a demonstrated history of persistent non-compliance. It is not appropriate to issue a DPO if the customer is honouring a current payment arrangement, or if there are sufficient arrangements in place to satisfy the child support debt, no matter what the size of the arrears.
>
> …
>
> The number of occasions on which action has been taken to recover the debt and the outcome of the recovery action, will also be considered when determining whether the payer's behaviour can be considered persistent and unreasonable.
>
> **Capacity/Assets**. If the paying parent has no capacity to pay the debt their failure to pay cannot be considered to be persistent or without reasonable grounds. Although it can be argued that International travel shows a capacity for a customer to meet their child support responsibilities, you need to form a clear profile of the customer's financial status at the time of the DPO submission, including any:
>
> - Business or joint incomes
> - Liquid assets that cannot be addressed administratively
> - Other assets that can be borrowed against, even joint assets
> - Capacity to borrow funds etc.
>
> **RISK POINT:** A CSO must be able to demonstrate that the Agency has taken all reasonable action to contact and negotiate with the customer about their current child support situation. These can include, but are not limited to:
>
> - System generated letters (e.g.: registration, statements CAL etc)[30]
> - Documented conversations with the customer.

4.14 The PI acknowledges that a person who has no capacity to pay their debt would have reasonable grounds for their failure to do so. The PI does not directly address the situation where the person has capacity to pay some of their debt, but not all of it, before their intended travel. However, the Ombudsman's office considers that this situation would be caught by the statement in the PI that '[i]t is not appropriate to issue a DPO if the customer is honouring a current payment arrangement, or if there are sufficient arrangements in place to satisfy the child support debt, no matter what the size of the arrears'.

4.15 Most of the CSA submissions detailed what the CSA knew about the payer's financial circumstances. However, none of the submissions contained a 'clear profile of the customer's financial status at the time of the DPO submission' as required by the PI. In fact, the logic underpinning many of the submissions appeared to be that

[30] A registration letter is the first letter sent to a CSA customer in which the CSA advises that it has accepted an application for child support; a statement is a monthly statement of a payer's account, which shows the arrears and any new amounts due; and a CAL letter is a letter from the CSA asking the person to call the CSA to talk about their case.

the mere fact that the payer intended travelling overseas showed that he or she had additional financial resources that should have been used to satisfy their child support debt, despite what appears to have been intended as a caution against such a mindset in the PI. In fact, in several cases, another person, such as a family member, had funded the payer's travel.

4.16 We considered that the CSA's conclusion that the payer had persistently and without reasonable grounds failed to pay their child support debt was reasonable in only one of the 21 cases that we examined. (Interestingly, in that case, we became aware of the CSA's DPO when the payee complained to us that the payer was able to leave Australia despite the fact that the CSA had issued a DPO.) In this office's opinion, the CSA's efforts to contact the payer to enter into a payment arrangement before proceeding to make a DPO were adequate only in a further three cases.

'CSA believes it is desirable to make a DPO'

4.17 The heading above appears in the CSA's PI and in *The Guide,* and is intended to be a paraphrase of the requirement in s 72D(1)(d). However, it misses several important elements of that provision. Firstly, the CSA's belief must be held 'on reasonable grounds'. Secondly, the CSA must believe that making a DPO is desirable 'for the purposes of ensuring that the person does not depart from Australia for a foreign country without … wholly discharging the child support liability; or … making arrangements satisfactory to the Registrar for the child support liability to be wholly discharged'.

4.18 For the purposes of assessing whether the CSA had followed its own procedures in deciding to make a DPO in the sample of cases, we note the following statements in the PI about when the CSA believes it is desirable to make a DPO:

> CSA will generally make a DPO if satisfied that the payer has the ability to discharge the debt and is either:
>
> - Likely to fail to return to Australia without paying the debt or making satisfactory arrangements to do so; or
> - Is likely to discharge his or her debt or make a satisfactory arrangement to do so if a DPO is made.
>
> A DPO may be appropriate if the payer:
>
> - is transferring assets off-shore
> - has resources that would enable them to remain offshore — eg. family, assets, employment of a business
> - is likely to discharge the debt or make satisfactory arrangements if the DPO is made.
>
> A DPO may be inappropriate if the payer:
>
> - retains significant assets in Australia
> - retains a job in Australia
> - retains family ties in Australia.

4.19 We raised some concerns about the CSA's policy that it is generally desirable to make a DPO if this will make payment of the debt more likely. However, we checked each submission to see whether it referred to evidence that showed that the CSA had reasonable grounds for that belief. Such evidence was included in only two

submissions. The remainder merely asserted that a DPO would make payment of the debt more likely.

4.20 Eight submissions included evidence to suggest that the CSA considered the person was a flight risk. In only three of those cases did the submission discuss the payer's connections with Australia. This office considers the CSA's practice of making a DPO for a payer who is not a flight risk and intends travelling overseas on a short business trip or a holiday can be problematic if the person is given very little notice of the DPO and stands to forfeit the cost of their ticket if they cannot travel as planned.

4.21 Part 5 of this report contains case studies based on six of the cases in the sample. The case studies illustrate a range of problems that we have identified with the CSA's decision-making processes in relation to DPOs.

Formal requirements and evidence for DPOs

4.22 It is good administrative practice to keep records showing what action and decisions have been taken in a particular case, and by whom. Table 2 at Annex B shows the results of our checks of the CSA's documentation of the decision to make a DPO and its notification to the payer.

DPO submission template

4.23 The PI contains a template for CSA staff to use when preparing a DPO submission. Only three submissions were on the PI template. It appears that each state has changed the template in some way. This does not, of itself, affect the validity of a decision, however, it could lead to inconsistency. It seems reasonable to assume that when the CSA provides a national PI that it expects the staff in all states to follow it and to use any standard letters and decision templates included within it.

4.24 The CSA's computer system, Cuba, has a series of screens upon which the CSA records the submission to issue a DPO and the name of the CSA officer who prepared the submission. The name of the officer who authorised or approved the DPO is recorded in a box marked 'Auth Officer' on the relevant screen in the CSA's computer records for the case. In 12 of the 21 cases, the authorising officer also recorded their decision by writing 'Approved' or 'DPO approved' at the end of the submission, noting their name and position, or in the text of an email copied onto the Cuba record. In the remaining nine cases, the only evidence that the DPO submission had been considered and approved/authorised was the name of the authorising officer recorded on the relevant Cuba screen. It is a concern that more effort had not been taken by the decision-maker to confirm their personal satisfaction that each of the conditions listed in s 72D (1) and (2) of the CSRCA was met.

DPO template

4.25 The PI also contains a DPO template for the delegated officer to complete when making the DPO. The DPO template identifies the decision-maker by name, and states that the person has decided to make a DPO 'believing on reasonable grounds that it is desirable to do so for the purposes of ensuring that the person subject to the child support liability referred to in the Schedule does not depart from Australia for a foreign country without (a) wholly discharging the child support liability or (b) making arrangements satisfactory to the Registrar of the Child Support Agency for the Child Support liability to be wholly discharged …' The CSA had made the DPO using this template in only 10 of the 21 cases in the sample.

4.26 The remaining 11 DPOs were made in a different format. The main difference was that the approved DPO template stated that the officer who signed the DPO was personally satisfied that it was desirable to make the DPO, whereas the alternative version merely stated that the officer was prohibiting the person's departure from Australia pursuant to s 72D(1) of the CSRCA. Making the DPO using the template would correct any defects in the record of the CSA's decision, as discussed in paragraph 4.24 above.

4.27 None of the DPOs identified the amount of the child support debt which led to the CSA making the DPO. Those DPOs made using the template in the PI included a Schedule, which it appears was intended to be completed with the amount of the debt. Instead, the words 'Arrears of Child Support registered with the Child Support Agency' were written in the schedule. We believe that it would be preferable to record the actual amount of the child support debt on the DPO for the information of the person subject to the DPO.

Authority of the decision-maker

4.28 It is a basic principle of administrative law that a decision-maker must have legal authority to make a decision, otherwise the decision is invalid. We checked each case in the sample to ensure that the CSA's decision to issue a DPO was made by an appropriately delegated officer (as discussed in paragraph 2.21 above). This involved checking that the person who approved the submission to make a DPO held the appropriate delegation; and that the actual DPO had been issued and signed by the person who approved the submission. We also checked whether the CSA's letter to the payer advising that a DPO had been made was accurate.

4.29 In all 21 cases, we found that the electronic copy of the submission to make a DPO contained in the CSA's records was approved by a person who appeared to be an appropriately delegated officer. Either the officer included their position (Service Delivery Manager) in their approval of the submission; or we could tell from another case in the sample that the particular officer was a Service Delivery Manager; or we contacted the CSA to confirm the person's role at the time the DPO was made.

4.30 However, in four cases, the officer whose name appeared on the actual DPO was not the person who approved the submission to make a DPO. There was no evidence to suggest that the officer whose name appeared on those four DPOs had read the submission, or was even aware of the case, apart from the fact that the DPO was issued in his or her name. This could cause those four DPOs to be invalid, even though three of them were issued in the name of a person who would have been entitled to make the decision if he or she was satisfied that it was appropriate to do so in the particular case.[31] In the fourth case, the officer whose name and signature appeared on the DPO was not a delegate; this is a further basis for doubting the validity of that particular DPO.

Notice to the payer

4.31 The CSA is required to send a copy of the DPO to the payer as soon as is practicable after it is made.[32] The CSA sent a copy of the DPO to the payer in 20 of

---

31 'The attempted exercise by a delegate of his own power miscarries when the very act of exercise purports to deny the power which gives validity to his act.' *Re Reference under Section 11 of Ombudsman Act for an Advisory Opinion; Ex parte Director-General of Social Services (1979) 2 ALD 86 (Administrative Appeals Tribunal)*, per Brennan J at 95.

32 See s 72G(3) of the CSRCA.

the 21 cases in the sample.[33] Included with the DPO was a covering letter to the payer. In all but one case, the letter appeared to be based on a standard template, in the following form:[34]

> Dear <payer's first name>
>
> As the Child Support Agency (CSA) has been unsuccessful in making suitable arrangements with you to pay your outstanding child support, I have issued a Departure Prohibition Order.
>
> The Order authorises the Australian Federal Police to prevent your departure from Australia. I enclose a copy of the order.
>
> …
>
> Yours sincerely
>
> <Officer's name>
> <Officer's position>

4.32 Despite the clear statement in the letter that the DPO had been issued by the writer, in 15 of the cases in the sample, the name of the officer shown in the letter was not the same as the name of the officer who had issued the DPO. We consider this to be poor administrative practice, even though the error in the letter is unlikely to invalidate an otherwise valid DPO.

4.33 Of the 20 cases where the CSA sent a copy of the DPO to the payer, there were only two where the CSA's submission, order and letter were all signed by the same person, who possessed the appropriate authority to make a DPO.

4.34 We also noted that the CSA's standard letter contained an incomplete statement of the debtor's appeal rights. The letter says:

> If you do not agree with the decision to make the order you may appeal to the Federal Court of Australia. I strongly encourage you to discuss your case with the CSA before taking this step.

4.35 While s 72Q of the CSRCA does give a person a right to appeal to the Federal Court of Australia against the making of a DPO, they can also apply to the Federal Magistrates Court. It would seem that the CSA had failed to update its standard letter to reflect this change, which occurred in 2001. We consider this to be a significant omission. There is no fee for lodging a DPO appeal with the Federal Magistrates Court, however, the same application in the Federal Court of Australia has a filing fee of $785. It is possible that the cost of filing an application in the Federal Court, on top of paying for legal representation, may have discouraged people from lodging appeals about DPOs.

4.36 The CSA's letter also failed to inform the person of their right to complain to the Commonwealth Ombudsman about the CSA's decision. We consider this an important oversight, especially when the CSA's usual internal objection process does not apply to a DPO decision and nor can a person apply to the SSAT for review of a DPO.

---

[33] The exception was a case where the CSA did not know the postal address of the payer, who had been outside Australia for an extended period.

[34] The exception was a letter that read 'As we have been unsuccessful in making arrangements with you to pay your outstanding child support arrears, we are issuing a Departure Prohibition Order.'

4.37 During the preparation of this report the CSA responded to these issues by updating the letter to refer to the Federal Magistrates Court and the Ombudsman. However, we understand that the CSA's DPO letters still do not include information about the person's right to apply to the CSA for a DAC, revocation of the DPO, the AAT's jurisdiction to hear appeals about the CSA's decision in relation to a DAC or refusing to revoke a DPO.

PART 5—DEPARTURE PROHIBITION ORDER CASE STUDIES

5.1 The following case studies have been prepared using six individual complaints drawn from the sample cases discussed above.

5.2 The Ombudsman's office asked the CSA to consider revoking its decision to make a DPO in the first three cases (Mr R, Mr U and Mr B). The CSA agreed with our suggestion that the decision to make a DPO was not appropriate for Mr R and Mr U. However, the CSA advised us that it considered its decision to make a DPO for Mr B was sound and as a result, Mr B was unable to travel as planned. As the case study shows, we have reservations about the CSA's decision in Mr B's case.

5.3 In the fourth case, Mr C's complaint to this office related to the CSA's failure to provide him with timely notice that a DPO had been made. Our investigation at the time did not focus upon the reasonableness of the CSA's decision to issue the DPO. The fifth case was identified by this office through a complaint made by a person who had been mistakenly stopped at the airport because his name was similar to the payer (Mr H) for whom the CSA had made the DPO (the case study discusses the case from the perspective of Mr H, rather than the unrelated person who complained to the Ombudsman). In the sixth case, Mr J complained to this office after he had been stopped at the airport trying to leave the country.

Case study one: Mr R

5.4 Mr R's monthly child support was approximately $1,000. He was making regular payments to the CSA to cover this amount.

5.5 Mr R's child support account had fallen behind just over 12 months earlier, when the CSA decided to reverse a decision to credit $14,000 towards his child support debt. This was the amount that he had paid direct to his child's school for school fees. The payee had originally agreed to the CSA crediting the amount, but subsequently objected to the decision. Mr R had negotiated a payment arrangement with the CSA. His extra payments had reduced the arrears to $6,000.

5.6 In April 2008, Mr R's child support assessment was varied to $2,300 per month. The variation was backdated for two years, increasing his arrears by $12,000. This additional amount was not due to be paid to the CSA until June 2008.

5.7 On 29 April 2008, Mr R contacted the CSA to discuss his debt. The CSA suggested that he pay an additional $755 per month to clear the arrears in less than two years, in addition to his new monthly rate $2,300 per month. Mr R said he could not afford to do this on his current salary. He said he could not borrow any money, but that he was looking for a new job where he could earn more money, probably overseas in the same industry. He explained that he was considering resigning from his current employer in order to 'cash out' his annual leave and that he would pay the bulk of this amount to the CSA in partial satisfaction of his debt. It was implicit in Mr R's advice that he intended to continue paying child support if he went overseas.

5.8 On 2 May 2008, the CSA advised Mr R that it was considering issuing a DPO as there was no guarantee he would comply with the payment arrangement if he went overseas. The CSA officer advised Mr R that he would be required to pay the

total debt of approximately $19,000 in full before he would be permitted to leave Australia, in spite of the fact that the bulk of the debt had not yet fallen due.

5.9 On 6 May 2008 the CSA received information indicating that Mr R was planning to leave Australia the following week for a country with which Australia has no reciprocal arrangements to collect maintenance.

5.10 On 7 May 2008, the CSA issued a DPO. The decision-maker's stated reasons for making the DPO were that Mr R 'has advised that he may leave Australia for a non-reciprocating country and cannot meet current liability'.

5.11 On 21 May 2008, we contacted the CSA and confirmed that it had issued a DPO. We asked that the CSA reconsider the decision as Mr R's payment history did not suggest that he had persistently and without reasonable grounds failed to pay his child support. We were also concerned about the basis upon which the CSA considered it was desirable to make the DPO, given that Mr R had indicated his willingness to continue making payments to the CSA while overseas.

5.12 On 27 May 2008 the CSA revoked the DPO. It conceded that Mr R's case did not satisfy the requirements of s 72D. The CSA acknowledged Mr R's excellent payment history and willingness to consistently make payment arrangements to clear his debt within a reasonable timeframe.

Case study two: Mr U

5.13 Mr U had made a child support agreement with the payee in 2003 which set his child support at a fixed monthly rate. His financial circumstances had changed shortly after the CSA registered the agreement for collection. Mr U's business had ceased operation and he was now bankrupt. He was working casually and receiving some Centrelink benefits. The CSA was collecting child support from his wages and benefits, but this was not enough to cover his child support debt. Mr U's monthly child support was almost $1,300 and by October 2008 he had child support arrears of almost $43,000.

5.14 The CSA had advised Mr U repeatedly that his options to reduce his child support were to make a new agreement with the payee, or to apply to court to vary his existing agreement. When it became apparent that Mr U and the payee could not agree about a new child support rate, Mr U had applied for legal aid and made an application to court. The court had listed his case for hearing in July 2009.

5.15 The CSA was aware of Mr U's financial situation and it accepted that Mr U could not afford to pay any more than it was currently collecting. In late September 2008, Mr U told the CSA that he was looking for work in his trade, overseas and interstate. It seems that during that conversation, the CSA mentioned the possibility of it making a DPO to prevent him leaving Australia.

5.16 In early October 2008, Mr U advised the CSA that he had found a job overseas and that he had booked his travel. The CSA told him he would not be able to leave Australia unless he paid off his child support debt. Mr U had several conversations with the CSA about possible payment arrangements, but the CSA consistently told him that he would have to pay off the entire debt before he could travel. Mr U asked the CSA to talk to his solicitor about his court application and the CSA said that it could not do so because of privacy considerations. The CSA had not made a DPO at this point.

5.17 Mr U contacted the CSA again to discuss making a lump sum payment towards his arrears, by seeking early release of his superannuation. He also suggested that his partner may be able to lend him money if she sold her property. He asked the CSA for a letter confirming that it had made a DPO. The CSA told him that it could not do this because the DPO had not yet been finalised.

5.18 Mr U's solicitor sent a letter to the CSA by facsimile explaining that Mr U had a job offer that would allow him to pay more child support. The solicitor explained that the trip had been funded by Mr U's partner's family and that he was aware that the CSA has reciprocal arrangements for recovery of child support with the country where he intended working. The letter advised the CSA that Mr U had applied to court for orders staying his child support arrears, but that the first available hearing date was in July 2009. The letter requested that the CSA permit Mr U to travel, or send a copy of the DPO to his solicitor together with written reasons, so he could seek legal aid to appeal the decision.

5.19 The CSA did not respond to this letter. The CSA made a DPO five days later. Mr U contacted the CSA's complaints service and sent the CSA a written objection to the DPO decision. The CSA did not respond to the objection, which was not valid. Mr U's only right of appeal was to apply to a court.

5.20 Mr U complained to this office. We contacted the CSA two days before his intended departure to discuss the basis for its decision to issue the DPO. We suggested that the CSA may not have had a reasonable basis for making the DPO. Mr U was making payments to the CSA in accordance with his capacity; he had applied to court to vary his child support agreement; he intended returning to Australia for the proceedings; and the purpose of his travel was to work overseas, which he said would allow him to make greater payments to the CSA. We also noted that the CSA could call on its foreign counterpart to collect money from Mr U's wages if he failed to make voluntary payments. The CSA told us that it believed its decision was sound and that the reciprocal arrangements were not relevant.

5.21 The next day, we contacted the CSA's State Manager and asked that the CSA consider revoking the DPO. Shortly afterwards, we received another call from the CSA. The CSA officer told us that the CSA believed the DPO decision was correct, but it might be able to issue a Departure Authorisation Certificate to Mr U if he could make a suitable payment arrangement that would operate overseas. The CSA undertook to contact Mr U to seek more information about his intended employment and to discuss what he could afford to pay from his wages if he took up the job.

5.22 The CSA revoked the DPO the next day, three hours before Mr U's flight was due to leave Australia. The delegated officer had not been aware of the information in Mr U's solicitor's letter when she made the DPO. She was now satisfied that Mr U had made satisfactory efforts to address his child support debt and that the CSA had failed to give him a reasonable opportunity to negotiate a payment arrangement based on what he would be earning overseas.

Case study three: Mr B

5.23 Mr B's monthly child support was approximately $400. He was behind with his child support payments, with arrears of around $10,000. He was paying the CSA only $60 per week and this amount was not sufficient to cover his regular child support, let alone reduce his arrears.

5.24 Mr B had paid school fees of $6,000 direct to his children's school and asked the CSA to credit this amount towards his child support debt. However, the CSA was not satisfied that Mr B and the payee had both intended that the fees would count as child support, so it had not subtracted them from his arrears. Instead, the $6,000 remains as a credit on his CSA account, and Mr B can gradually use it in partial satisfaction of his current monthly child support liability. Whenever Mr B pays at least 70% of his monthly child support to the CSA in cash and on time, the CSA allocates an amount from the credit equivalent to 30% of his child support for that month. However, his payments to the CSA each month were usually less than 70% of his child support for the month, so the credit was not being used.

5.25 On 15 January 2008, the CSA contacted Mr B about his debt, and he subsequently visited the CSA to discuss his arrears. The CSA told Mr B that they had evidence he had the capacity to pay the debt in full, and that he needed to make full payment, less the amount of his credit, by the end of January 2008. The CSA told Mr B that if he failed to do this, it would take court action to recover the money from him. Mr B was an undischarged bankrupt. He had previously been a business owner, but had transferred ownership of the business and all his assets to his new partner. It would seem that the CSA believed Mr B retained a controlling interest in this business and this was the reason why the CSA believed he could pay more child support.

5.26 On 14 February 2008, Mr B contacted the CSA and advised that he would not enter into an arrangement to pay off the debt. He said that he could only afford to pay $60 per week. The CSA officer advised Mr B that the CSA was aware he was intending to travel overseas in March and that a DPO would be issued preventing the travel unless the debt was paid in full.

5.27 On 21 February 2008, the CSA issued a DPO. Mr B contacted the CSA once he received the letter about the DPO and advised that he did not agree with it. He said he had no money or assets and that his partner was paying for his overseas travel. He said that the purpose of his travel was to attend a family wedding.

5.28 Mr B complained to the Ombudsman's office about the CSA's decision to issue a DPO. He said that there was no question he would not return from overseas as this was a two week holiday, he was not a flight risk, and his trustee in bankruptcy had expressly provided permission to travel. He said the CSA had rejected his offer to increase his child support payments for two months.

5.29 We contacted the CSA to discuss its decision to issue a DPO for Mr B. We were concerned about the basis upon which the CSA was satisfied that Mr B's failure to pay his child support was persistent and unreasonable, given that Mr B was an undischarged bankrupt who was making regular payments, and who had an unallocated credit amounting to more than half of his outstanding child support liability. We suggested to the CSA that Mr B's planned holiday would not affect the CSA's ability to collect child support from him, and that the trustee in bankruptcy appeared to hold similar views. We also noted that it was open to the CSA to take legal action to enforce the debt, if it believed that Mr B had additional financial resources, or that he had transferred his business to his partner in order to defeat his child support obligations.[35]

5.30 The CSA refused to consider revoking Mr B's DPO. It suggested that by issuing the DPO rather than commence court proceedings, it was saving Mr B the

[35] See s 72C of the CSRCA.

expense of legal costs. Mr B did not end up going overseas. The CSA did not collect any extra money from him either. The CSA's DPO decision seems to have had a punitive result for Mr B, without achieving a positive collection outcome for the payee and children in the case.

Case study four: Mr C

5.31 Mr C had made an arrangement with the CSA to pay $250 per month. Despite this, he was only paying the CSA around $150 per month. When the CSA spoke to him in November 2006 he said that this was all he could afford at present. He advised that he was applying for a bank loan and that he would settle his child support debt if it was granted. He also told the CSA that he would be able to pay an extra $400 per month when he repaid another debt in 4 months.

5.32 By April 2007, Mr C was more than $7,000 behind with his child support payments and his ongoing child support liability was around $650 per month. He was still paying around $150 per month to the CSA. The CSA was aware, through checks with the Department of Immigration and Citizenship (DIAC) that Mr C regularly travelled overseas. It had also identified that he was the registered owner of a number of properties, and that he received rental income.

5.33 In early April 2007, the CSA called Mr C to advise that unless he made a satisfactory payment arrangement the CSA would commence legal action. Mr C said he was unable to discuss the matter at that time and the CSA arranged to call him back the following day at 2.30pm. It would seem that the CSA officer failed to call him at the agreed time.

5.34 On 19 April 2007, the CSA attempted to contact Mr C and left a message on his answering machine. Mr C did not return the call. The CSA officer did not make a follow-up call.

5.35 On 24 April 2007, the CSA issued a DPO against Mr C. At the same time, the CSA put in train steps to commence legal proceedings against Mr C to recover his debt.

5.36 On 27 April 2007, Mr C attempted to depart Australia for Europe with an official delegation on a business trip. Mr C says he was unaware that the CSA had issued a DPO until he was detained by the AFP at the border. He was able to contact the CSA from the airport. Given the circumstances, the CSA issued him with a DAC, which allowed him to travel.

5.37 Mr C complained to the Ombudsman about the CSA's failure to give him notice of the DPO before his travel. He said that the incident had caused him considerable embarrassment and expense.

5.38 Our investigation concluded that there was no evidence that the CSA was aware that Mr C was to travel imminently when it made the DPO. The more likely consideration was the fact that he had travelled overseas frequently in the past.

5.39 The CSA's records show that it sent a copy of the DPO to Mr C after it was made. However, the CSA had not attempted to contact Mr C by telephone or to arrange to provide him with a copy of the notice by facsimile or email, as per its procedures.

5.40 We have reservations about the CSA's decision to issue a DPO for Mr C. The CSA could have explored other administrative options for collecting the debt, and it was intending to take legal action. Mr C's ties to Australia and minimal risk of asset dissipation were not considered, nor was evidence provided for the reasonable belief that making the DPO would make payment of the debt more likely (in accordance with the test that *The Guide* and PI says is appropriate).

Case study five: Mr H

5.41 Mr H had a child support debt of around $5,000. His current child support was assessed at the minimum rate (approximately $320 per annum).

5.42 Mr H had not lodged a number of tax returns and the CSA had based his assessment on the most recent tax return available, which showed his income was very low. The CSA had no evidence to suggest that he was currently working. It had not been able to trace any bank accounts or assets in his name. The CSA asked Mr H to lodge his overdue tax returns by early March 2007. He had not done so.

5.43 The CSA contacted Mr H after it became aware that he was intending to travel overseas. Mr H confirmed that he was intending to visit his mother who was sick in hospital and that his parents had paid for the airline tickets.

5.44 Mr H refused to enter into an arrangement to pay his debt. The basis for his refusal appeared to be his statement that he had no income. Mr H told the CSA that he was unemployed and that he received no Centrelink benefits. He said he was not working at present because of his caring responsibilities for the two children of his current relationship. He said that his current partner was supporting him and that if he was working he would have to pay child support as well as childcare fees and he did not want to have to do that.

5.45 The CSA advised Mr H the day before he was due to travel that it was considering issuing a DPO. The DPO was issued on the day of his intended departure.

5.46 The CSA's DPO submission shows that the decision to make a DPO was made on the basis that the CSA had been unsuccessful in making an arrangement with him to pay his debt. There was no evidence to suggest that the officer who made the DPO considered whether Mr H had the capacity to pay the outstanding child support, which the DPO PI says is a relevant factor in deciding whether the payer has persistently and without reasonable grounds failed to do so. Additionally, there was no evidence provided to support a reasonable belief that making the DPO would make payment of the debt more likely in this case. In these circumstances, it would appear that the CSA's decision to issue a DPO had a punitive effect.

5.47 Mr H did not complain to this office about the DPO. We identified this case through a complaint made by an unrelated person with a similar name, who was stopped at the airport in error. It would seem that Mr H did not travel as planned.

Case study six: Mr J

5.48 Mr J had child support arrears of almost $8,000. He was working casually and the CSA had instructed his employer to deduct 20 cents in the dollar from his wages for child support, collecting around $65 per fortnight. This arrangement had been in place for a number of years; however the deductions were not enough to cover Mr J's monthly child support and his arrears were increasing.

5.49 The CSA became aware that Mr J intended travelling overseas. It contacted him the day before his planned departure. Mr J confirmed that he was leaving Australia for a 14 day holiday and stated the travel had been paid for by a friend. He offered to come into the CSA on his return and sort out the outstanding debt. The CSA officer advised Mr J that this was not a suitable arrangement. The CSA officer told Mr J that a DPO would be issued preventing his travel unless he attended CSA and made a payment of $2,000. Mr J advised the CSA he considered this a threatening action and would seek legal advice. He did not make any payment to the CSA.

5.50 The CSA made a DPO later that same day. The next day, Mr J was detained by the AFP on his attempt to depart Australia. He told us that he could not raise the $2,000 that the CSA had asked him to pay in order for it to permit him to leave on his holiday, and as a result his friend forfeited the costs of his travel and accommodation.

5.51 The CSA's DPO submission contains no evidence to suggest that the CSA considered whether Mr J had the capacity to pay more towards his child support debt. The submission does not detail any assets or resources available to Mr J, nor did the CSA attempt to renegotiate with Mr J the rate at which it was collecting child support from his wages. Aside from the phone call immediately prior to the issuing of the DPO, the CSA had apparently not contacted Mr J to advise him that the recovery arrangement was unsatisfactory and insufficient. Further, the CSA's PI says the CSA will not issue a DPO where the debt can be collected by normal administrative means, such as a garnishee notice.

5.52 The CSA does not appear to have considered the fact that Mr J's travel was in the form of a short-term overseas holiday, from which it had no reason to believe that he would not return. In this context it could be construed that the decision to issue a DPO on Mr J was punitive.

Ombudsman conclusions about these case studies

5.53 These six case studies illustrate a number of this office's concerns about the CSA's approach to making a DPO. Most importantly, the CSA appears not to be following its own procedures. In many cases, the CSA's actions suggest that it presumes that a DPO will be appropriate in any case where the person has a child support debt and has been at all reluctant to enter into a voluntary payment arrangement that will quickly settle their debt. This appears to be the case even where there is very little evidence, beyond the mere fact of the person's intended travel, that they have the capacity to pay more, such as in the cases of Mr U and Mr H.

5.54 Furthermore, the CSA appears to be prepared to move very quickly to issue a DPO in these cases even where it has arrangements in place to recover the debt over time, or where there are other administrative options available to recover the debt, or even where court action appears to be an appropriate alternative avenue.

5.55 The CSA's submissions in many of these cases suggest that the CSA is using the threat of a DPO to pressure a person into settling their child support quickly, or to enter into negotiations where they may not previously have been willing to do so. A payer's intended international travel is viewed as a 'collection opportunity' and the presumption is that the payer should be prepared to rapidly make an arrangement to settle their debt, by paying all of it or a lump sum, before the CSA will consider letting them leave Australia.

5.56 We accept that it is not unreasonable for the CSA to act on the basis that it can use a DPO in this 'coercive' fashion. However, we consider that the CSA should be mindful of the possible impact the DPO will have on the person when deciding whether it is desirable to exercise its discretion to make a DPO. In particular, where the person's travel is imminent, the CSA should consider whether the debtor will have sufficient time to respond with arrangements to settle the debt or amend their travel plans.

5.57 There is also a question of proportionality and balance. In five of the six case studies, the CSA issued a DPO for child support debts ranging from $5,000 to $10,000, in circumstances where there was no evidence to suggest that the payer involved was a flight risk, or that they intended to hide or dissipate assets overseas. There was nothing to suggest that the CSA considered whether its own failure to act had contributed to the size or age of the person's child support debt.

5.58 The case studies also suggest that the CSA could do more in terms of ensuring that the debtor is promptly made aware that the DPO has been made. In the case of Mr C, the CSA appears to have failed to call him at an agreed time to continue negotiations about a suitable payment arrangement and also failed to send him a copy of the DPO by facsimile as per its procedures. In the case of Mr J, the CSA did not telephone him to advise that a DPO had been made, even though it was aware that he intended travelling the next day. Prompt advice of the DPO could arguably have avoided embarrassment and expense for Mr C and Mr J.

5.59 It is a concern that in several cases the CSA's decision to issue a DPO appears to have punitive overtones, with no consequent improvement in the child support collection outcome. This is a particular issue when the source of the CSA's information about the payer's intended travel is the payee entitled to receive the unpaid child support, as is so often the case. There is a risk that the CSA could be seen to be issuing the DPO at the behest of the payer's aggrieved estranged partner. While it may not seem fair for a person with unpaid child support to be going overseas on a holiday, it should be noted that the Commonwealth Parliament did not give the CSA the power to prevent all child support debtors from travelling overseas. It should, however, be noted that we did not see any evidence in the cases we examined to suggest that the CSA's decision to issue a DPO was intended to be punitive, or that the CSA officers involved acted in anything other than good faith. At most, we consider the CSA may have failed to appreciate the adverse impact of a DPO decision, and the restriction that it places on a person's liberty.

5.60 Making a DPO should not distract the CSA from its primary task, which is to collect the unpaid child support so that it can transfer the money to the payee for the benefit of the child or children, as quickly as possible. A DPO is of questionable benefit if it does not lead to the CSA recovering any additional child support, such as the case of Mr B. In fact, preventing someone from travelling to visit a sick relative or to attend a family celebration may make the task of collecting child support from that person in future even more difficult. Particularly in those cases where the collection outcome is not improved, it would appear the only effect of the DPO is to further strain the relationship between the CSA and the payer.

5.61 A further issue highlighted by the case studies of Mr R and Mr U, is that the CSA may not be properly exploring the possibility of a suitable payment arrangement with debtors who plan to relocate overseas for work. While the CSA eventually acknowledged that it should not have made a DPO in these two cases, this result was achieved only after intervention by this office at a senior level within the CSA. Before our investigation, the CSA seemed to consider that it was appropriate to make

a DPO to keep the person in Australia, even though the new job was likely to improve the person's financial situation and thus their capacity to repay the debt.

5.62 Finally, Mr R's and Mr U's cases reveal the CSA's inconsistent approach to the significance of its reciprocal arrangements with other countries to collect child support debts. In Mr U's case, the CSA stated that it could not take into account these arrangements when Mr U offered to have payments deducted from his wages overseas, because *The Guide* says that this is not a relevant consideration for decision makers. However, in Mr R's case, the CSA said that lack of a reciprocal arrangement with the country where he intended to relocate was a factor influencing its decision to make a DPO.

5.63 In Part 6, we discuss what the courts have had to say about DPOs in the context of appeals made about taxation cases. These cases take a very restrictive view of the ATO DPO provisions. While we accept that the ATO provisions can be distinguished from the CSA provisions, they are discussed below to ensure that the CSA takes due account of this approach from the Federal Court, and accordingly is rigorous in the use of its DPO powers.

PART 6—INTERPRETATION OF THE RELEVANT LEGISLATIVE PROVISIONS

Does case law about ATO DPOs apply to the CSA?

6.1 The Explanatory Memorandum for the Bill giving the CSA the power to make DPOs states that the power is modelled closely on the ATO DPO power in s 14S of the TAA. For ease of reference, s 14S(1) and s 72D of the CSRCA are included at Attachment C of this report.

6.2 A taxpayer can appeal to a court under s 14V of the TAA against an ATO DPO, in the same way that a child support debtor can appeal to a court under s 72Q of the CSRCA about a CSA DPO.

6.3 Given the similarity of the ATO and CSA provisions, we considered that the case law about ATO DPOs was relevant to the interpretation of the CSA DPO provisions. This is borne out by comments made in three recent cases in the Federal Magistrate's Court, which refer to earlier ATO DPO cases as having established precedents to be followed in CSA cases.[36]

6.4 Section 14S of the TAA allows the Commissioner for Taxation to consider making a DPO whenever a person has a tax liability. As noted earlier in this report, the CSA must also consider whether two further conditions exist, namely whether 'the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged' (s 72D(1)(b)); and 'the Registrar is satisfied that the person has persistently and without reasonable grounds failed to pay' their child support (s 72D(1)(c)). Significantly, this limits the pool of cases in which it would be appropriate for the CSA to consider making a DPO.

When is it desirable to make a DPO?

6.5 The majority of cases where a taxpayer has appealed to a court about the ATO's decision to make a DPO have concerned the correct interpretation of s 14S(1)(b) of the TAA. That provision says that the ATO can make a DPO if it:

> .. believes on reasonable grounds that it is desirable to do so for the purposes of ensuring that the person does not depart from Australia for a foreign country without:
>
> (i) wholly discharging the tax liability; or
>
> (ii) making arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged.

6.6 The courts have decided that this provision is not be interpreted literally. Instead, the cases show that the correct test for the ATO to apply when considering whether to make a DPO is whether the Commissioner:

---

[36] *Jones v Child Support Registrar [2007] FMC 1732; Albaugh v Child Support Registrar [2007] FMCAfam 1106* and *Russo and Child Support Registrar* [2009] FMCAfam 437.

> .. believe[s] on reasonable grounds that it is desirable to stop a person leaving Australia because it is necessary to collect the tax that is owed to the government and that that discharging of the tax liability will be affected by the person going overseas.[37]

6.7 The court stated in another ATO DPO case that:

> .. it is only the possibility or likelihood that the taxpayer's departure from Australia would adversely affect the revenue that there should be under this Act a restriction on the right of an individual in a free society to travel without bureaucratic impediment. The power to issue a DPO may not be exercised penally or for other purposes.[38]

6.8 The courts have also held that the ATO's belief that a DPO is desirable for the purposes of s 14S(1)(b) must be based on 'facts which are sufficient to induce that state of mind in a reasonable person'.[39] In other words, it is not sufficient for the ATO officer issuing the DPO to believe that it is desirable to do so. The belief must also be objectively reasonable, based on the available evidence. This requirement that the belief be objectively reasonable is a protection against the arbitrary use of power, and that protection is not to be trivialised by the use of the word 'desirable' in the provision.[40]

6.9 The wording of s 14S(1)(b) of the TAA is, in all important aspects, the same as the wording of s 72D(1)(d) of the CSRCA. This suggests that the case law about the correct interpretation of s 14S(1)(b) of the TAA is relevant to the CSA's administration of s 72D. It should nevertheless be noted that, to our knowledge, there has been no case to date where the courts have considered the correct construction of s 72D(1)(d) of the CSRCA by reference to cases dealing with the interpretation of s 14S(1)(b) of the TAA.

6.10 In the course of our investigation, we informed the CSA of our view that if the tax case law was applied it would suggest that the CSA should only be making a DPO in a case where it is satisfied that the three conditions in s 72D(1)(a), (b) and (c) are met, and where it believes on objectively reasonable grounds that it is desirable to stop the payer leaving Australia because their intended departure would in some way affect the CSA's ability to collect their overdue child support.

6.11 The relevance of this line of tax law is discussed below.

The CSA's interpretation of s 72D of the CSRCA

6.12 The CSA has advised us that it has noted the tax cases about DPOs. However, it disagreed with our suggestion that these tax cases might restrict the application of the DPO power in the CSRCA. The CSA advised us that in its view, once a case meets the first three tests provided by s 72D(1)(a)–(c), this would provide strong evidence that the person would not pay their child support unless the CSA made a DPO, and that in turn, this would constitute a reasonable basis for a belief that making a DPO was desirable.

---

37 *Dalco v Federal Commissioner of Taxation (1987) 19 ATR 443* at 447–448 per Young J, cited with approval by Jessup J in *Troughton v Deputy Commissioner of Taxation (2008) 166 FCR 9.*

38 *Edelsten v Federal Commissioner of Taxation (1989) ALR 85 ALR 226* at 231.

39 *Pattenden v Commissioner of Taxation [2008] FCA 1590* at para 58.

40 *Pattenden v Commissioner of Taxation [2008] FCA 1590* at para 93.

6.13 On 27 January 2009, we provided the CSA with a draft report of this investigation for its review and comment. In that draft report, we recommended that the CSA seek further advice about its interpretation of s 72D of the CSRCA.

6.14 The CSA has now further considered its interpretation of s 72D. Following that consideration the CSA remains of the view that it has reasonable grounds to believe it is desirable (as required by s 72D(1)(d)) to make a DPO to encourage a reluctant payer to pay their child support debt, and not just to prevent their departure from Australia if that would in some way affect the CSA's ability to collect the debt.

6.15 We have accepted the CSA's approach for the purposes of this report but we would still emphasise that the CSA may only use a DPO as a tool to encourage payment if it is satisfied that all of the other tests in s 72D 1(a)–(c) are met. This means that the CSA must be satisfied not only that the person has a child support debt, but that they have not made satisfactory arrangements to pay their debt, and that their failure to pay has been persistent and unreasonable. Furthermore, the CSA must be satisfied that the person actually has the capacity to pay the debt and reasonable grounds for its belief that preventing the person's departure from Australia will encourage them to do so.

6.16 In the absence of judicial interpretation of s 72D, and for the purposes of this report, we consider that it is reasonable for the CSA to act in accordance with its view that it can use a DPO to encourage a person to pay their child support debt. However, at the time of writing, we understand that there are a number of DPO appeals before the Federal Magistrates Court. It is possible that the question of the correct interpretation of s 72D and the applicability of the tax cases will be resolved in one of those proceedings.

Significance of the CSA's overseas recovery arrangements

6.17 We also note that a recent court decision about ATO DPOs would, if applied to the CSA power, cast doubt on the CSA's policy of ignoring the arrangements that exist for collecting child support from a person who moves from Australia to a reciprocating foreign jurisdiction, as described in the following extract from *The Guide*:

> Australia has entered reciprocal arrangements for the enforcement of child support liabilities with a range of foreign jurisdictions. However, the fact that a child support debtor's suspected destination is (or is not) a reciprocating jurisdiction is not a relevant factor for CSA to take into consideration when exercising the discretion to issue a DPO.[41]

6.18 In the context of considering whether it was desirable on reasonable grounds to make an ATO DPO, the court stated it was relevant:

> ... to take account of the ability to enforce an Australian revenue debt in places for which the debtor might reasonably be expected to reside abroad, insofar as it may be possible to identify the same.[42]

6.19 The CSA advised us that it does not agree that the debtor's intended destination is a relevant consideration, because s 72D does not specifically require the CSA to take into account whether the debtor intends to take up residence in a reciprocating jurisdiction. The CSA further notes that there would be significant

---

41 *The Guide* chapter 5.2.10: *Departure prohibition orders,* published on the CSA's website at www.csa.gov.au/guidev2/TheGuideMaster.aspx?content=5_2_10.

42 *Pattenden v Commissioner of Taxation [2008] FCA 1590* at para 94.

practical difficulties associated with establishing whether the debtor intends residing in a reciprocating jurisdiction. The CSA also considers that it may be difficult for it to assess whether the reciprocating jurisdiction will be likely or able to recognise or enforce the Australian child support debt.

6.20 While we accept there may be practical difficulties associated with assessing the impact and relevance of any reciprocal arrangements in a particular case, we are not persuaded that it is appropriate for the CSA to disregard them altogether in every case. In our view, the availability of any reciprocal arrangements for enforcing the child support debt while the payer is overseas is something that is relevant, and is therefore part of the totality of the debtor's circumstances. We consider that it would not be objectively reasonable for the CSA to ignore those arrangements when deciding whether it is desirable to make a DPO.

PART 7—CONCLUSIONS

7.1 The CSA's approach to DPOs is based upon a presumption that a DPO can be made whenever a reluctant payer intends to travel. This approach appears to be an effective aid to collecting child support in many cases. For the purposes of this report we accept the CSA can use a DPO as a tool to encourage a payer to pay their overdue child support. Nevertheless, the legislation requires that the decision-maker consider the payer's financial capacity to pay the debt (s 72D(2)(a)), and must be satisfied that all of the other requirements in s 72D(1) are met. Importantly, not only does the CSA have to be satisfied that making a DPO is desirable in a particular case; it must have reasonable grounds for that satisfaction. As the tax cases show, these grounds must be objectively reasonable, and not just reasonable in the mind of the CSA officer deciding to make the DPO.

7.2 We consider a court is likely to view the question of whether the CSA has reasonable grounds for believing that is desirable to make a DPO as one about balancing the payer's common law right to travel overseas against the importance of collecting child support in the particular case. This would seem consistent with the following excerpt from a judgment of the Full Court of the Federal Court, in an appeal about an ATO DPO:

> The requirement that reasonable grounds must exist to support the Commissioner's belief is a safeguard to the taxpayer that departure prohibition orders will not be made against him or her in unreasonable circumstances. The making of such an order is a severe intrusion into a person's liberty, privacy and freedom of movement. On the other hand, the protection of the revenue is of great importance to Australia. These two interests must be balanced. [43]

7.3 We do not consider the CSA's current policy for making DPOs provides its staff with the guidance they need to understand the complexity of the tests in s 72D, or to identify and balance all of the relevant considerations in a particular case. This suggests that the CSA should thoroughly review its policy about DPOs.

7.4 The results of our examination of a sample of CSA decisions to issue a DPO suggest that the CSA's staff are not following its existing policy and procedures for the administration of DPOs, and that some decisions are of questionable validity. Even though we have concerns about the adequacy of the CSA's written DPO policy and procedures, we consider that the CSA would have made a better decision in most of the cases that we examined if its staff had followed them. We also found that DPO decisions had not been properly documented, or notified to the payer.

7.5 A significant proportion of the DPOs made in the cases within the sample were issued in the name of a person other than the delegated officer who made the decision. We believe that this error could mean that those DPOs were not valid. Furthermore, the letter advising the payer that the CSA had issued a DPO indicated that the decision was made by a person other than the relevant delegate. This is unlikely to invalidate the DPO, but it is poor administrative practice.

7.6 In our view, the CSA's written advice to a person of its decision to make a DPO does not contain sufficient detail about their options to challenge that decision. The CSA has revised its standard notice to include information about the person's right to complain to the Ombudsman's office and appeal to the Federal Magistrates

---

[43] *Poletti v Deputy Commissioner of Taxation (1994) 124 ALR 373.*

Court. The CSA's usual objection process does not apply to a DPO decision, and nor can the SSAT review a DPO decision. However, a person subject to a DPO can apply to the CSA for a DAC, and ask the CSA to revoke the DPO, and appeal to the AAT about those decisions. We believe the CSA's standard DPO notice should include information about those options.

7.7 We note that the CSA has set targets for issuing DPOs. We do not consider that this is an appropriate performance measure and are concerned that the pressure to meet a target may encourage staff to issue DPOs in inappropriate circumstances, at the expense of taking other appropriate collection actions.

7.8 Given the concerns expressed in this report about the criteria that the CSA has applied when making DPOs, the failure of CSA staff to properly apply those criteria in the cases we examined, and the proportion of cases in the sample where the DPO appears to have been issued by someone other than the delegated decision-maker, we have reason to question whether all of the DPOs currently in operation are correct. We understand that there were 1,004 CSA DPOs in force as at 8 May 2009.

PART 8—RECOMMENDATIONS

8.1 Arising out of this investigation, I make the following recommendations.

Recommendation 1

The CSA should review each case where a DPO is currently in force, to ensure that the decision is valid and appropriate.

Recommendation 2

The CSA should review its DPO procedural instruction to ensure that it appropriately directs the decision-maker's attention to the fact that the test for whether it is desirable to make a DPO must be based on objectively reasonable grounds, taking into account the totality of the debtor's circumstances, including any reciprocal enforcement arrangements the CSA may have with the jurisdiction to which the debtor intends travelling.

Recommendation 3

The CSA should review the information provided for guidance of staff administering DPOs. It should clearly identify the matters that are to be considered when deciding whether a person has made satisfactory arrangements to discharge their child support debt, with reference to their financial capacity, and whether their failure to pay child support is 'persistent and without reasonable grounds'. This guidance should include a range of examples and a discussion of the types of enforcement action that the CSA should have taken in the case, rather than simply focussing on the actions of the payer.

Recommendation 4

The CSA should review the current delegation arrangements for exercise of the Registrar's power to make a DPO, and consider whether delegated officers require additional training or technical skills to properly consider these matters. Alternatively, or additionally, that the CSA amend its DPO procedures to include a quality check by a senior technical officer before a delegate issues a DPO.

Recommendation 5

The CSA should review the information products that it provides to customers and their representatives to ensure that they do not suggest that the CSA will routinely make a DPO to prevent a child support debtor with arrears from travelling overseas.

Recommendation 6

The CSA should amend its standard notice of a DPO to include advice about the person's right to:

- appeal to the Federal Magistrates Court
- complain to the Commonwealth Ombudsman
- apply to the CSA for a Departure Authorisation Certification (DAC)
- apply to the CSA for revocation of the DPO
- apply to the Administrative Appeals Tribunal (AAT) for review of the CSA's revocation or DAC decision.

Recommendation 7

The CSA should consult with the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), as the department responsible for child support policy, about the suitability of the current arrangements for challenging DPO decisions. This would include consideration of the desirability of legislative amendment to enable internal review of the CSA's decision to make a DPO through its objections process, and external review via the SSAT, rather than limiting review to a court appeal. As a consequence it should also be considered whether it is efficient for the AAT to continue to have jurisdiction to review the CSA's decision to refuse to revoke a DPO or to refuse to issue a DAC.

Recommendation 8

The CSA should consider how to ensure that its current targets for making DPOs and the amounts to be collected are not perceived as a factor inappropriately influencing a decision maker.

PART 9—CSA'S RESPONSE TO RECOMMENDATIONS

9.1 On 18 May 2009, the CSA's Acting General Manager, Ms Jennifer Cooke, wrote to the Ombudsman acknowledging the findings of this investigation and advising of the action the CSA had taken to address them. The CSA's letter states:

> **Child Support Agency response to the Commonwealth Ombudsman's draft report on the Administration of Departure Prohibition Order powers**
>
> I am writing to provide you with the Child Support Agency's (**CSA**) response to the Ombudsman's draft report into the Administration of Departure Prohibition Order (**DPO**) Powers.
>
> The CSA acknowledges that your office's investigations into 21 instances of CSA's administration of the power to make a DPO under section 72D of the *Child Support (Registration and Collection) Act 1988* (Cth) (**the Registration Act**) revealed that on a number of occasions CSA officers did not adhere to existing policy and procedures for the administration of DPOs. Further, I note that your office's investigations found that CSA's current policy and procedure documents in relation to the DPO power do not provide staff with sufficient guidance to understand the complexity of section 72D of the Registration Act, or to identify and balance all of the relevant considerations on a case by case basis.
>
> In light of these findings CSA has immediately undertaken steps to improve the administration of the DPO power and review relevant policy and procedure documentation. Actions taken to date are as follows;
>
> - The four invalid DPOs referred to in the Draft Report have been revoked;
> - All current DPOs have been reviewed to determine their validity and a quality audit (of this review) is currently underway;
> - CSA has limited the delegations for making a DPO to Deputy General-Manager - Service Delivery; Assistant General-Manager - Enforcement Services; and Executive Level 2 officers in Enforcement Services;
> - The DPO function has been centralised into two teams;
> - The Procedural Instruction (**PI**) is being revised;
> - CSA is currently revising the DPO notification letter to advise customers that they may also appeal to the Federal Magistrates Court to include a statement that the customer may also complain to the Ombudsman; and
> - Additional training for DPO teams will be provided.

ANNEX A—TABLE OF COMPLIANCE WITH CSA PROCEDURES

Table 1: Ombudsman review of CSA DPO decisions: Compliance with CSA procedures

CSA ID	1. Customer Selection			2. CS Liability						3. No satisfactory arrangements to fully discharge liability						4. CSA satisfied payer has persistently and without reasonable grounds failed to pay				5. CSA believes it is desirable to make a DPO			6. CS Debt (PNAP credits)
	a	b	c	a(i)	a(ii)	a(iii)	b(i)	b(ii)	b(iii)	a	b	c(i)	c(ii)	c(iii)	d	a	b	c	d	a	b	c	
A	N	N	N	Y	Y	Y	Y	N	N	Y	N	Y	Y	Y	N	Y	N	N	N	N	N	N	$56,174
B	Y	Y	N	Y	Y	Y	Y	N	N	N	Y	Y	Y	N	N	N	N	N	N	N	N	N	$10,422 ($6,300)
C	Y	N	N	N	Y	Y	N	N	N	Y	Y	N	N	Y	N	N	N	N	Y	N	N	N	$7,613
D	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	Y	N	N	N	$6,741
E	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	Y	Y	$2,804
F	Y	N	N	Y	Y	Y	N	Y	N	Y	Y	Y	Y	N	N	N	Y	N	N	N	N	N	$49,136
G	N	N	N	Y	Y	Y	N	N	N	Y	Y	Y	Y	Y	Y	Y	N	N	Y	N	N	N	$33,780
H	Y	N	N	N	Y	Y	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	$5,429
I	Y	Y	N	N	N	Y	N	N	N	N	Y	Y	Y	Y	N	N	Y	N	Y	N	N	N	$8,514
J	Y	N	N	Y	Y	Y	Y	Y	N	N	Y	Y	Y	N	Y	N	Y	Y	N	N	N	N	$6,888
K	Y	Y	N	Y	N	Y	N	N	N	Y	Y	Y	Y	Y	N	N	N	N	Y	N	Y	N	$1,256
L	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N	$11,851
M	Y	Y	Y	Y	Y	Y	N	Y	N	N	N	Y	Y	Y	N	N	Y	Y	N	N	N	N	$17,359
N	Y	Y	Y	Y	N	Y	N	N	N	Y	Y	Y	Y	Y	N	N	N	N	N	Y	Y	Y	$3,354
O	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	Y	N	Y	N	$15,581
P	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	$76,689
Q	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	Y	Y	N	N	N	N	$23,163
R	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	N	Y	N	Y	N	$6,334
S	Y	Y	N	N	N	Y	N	N	N	Y	N	N	N	Y	N	Y	Y	N	N	N	Y	N	$19,169
T	Y	Y	N	Y	N	Y	N	N	N	Y	Y	Y	N	N	N	N	Y	Y	N	N	Y	N	$21,921
U	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	Y	Y	Y	N	N	N	N	$42,899
Number = Y	18	14	8	17	15	21	11	11	7	16	18	18	17	14	4	6	10	7	8	2	8	3	

Table 1 Legend:

1. Customer selection

a. Clear evidence of intent to travel via confirmation from payee, payer, or Department of Immigration and Citizenship (DIAC).
b. Details of impending departure, kind of travel, expected duration, destination.
c. Consideration of balance between acting quickly and having enough data about the travel to justify doing so.

2. The payer has a child support liability

a. Details of the child support liability, including:
   (i) basis of liability (formula, CoA, Agreement, Court Order, number of children)
   (ii) case active or ended
   (iii) breakdown of child support amounts (excluding spousal maintenance), consolidated revenue amounts, late payment penalties.
b. Evidence of debt correctness:
   (i) if default incomes used (because tax returns not lodged, evidence of investigation as to appropriateness
   (ii) all reported non-agency payments (i.e. direct to payee or to third parties in lieu of child support) investigated
   (iii) no outstanding case issues which may affect debt.

3. The payer has not made satisfactory arrangements to fully discharge the liability

a. Details of payments over the last 12 months
b. Details of recent past or current payment arrangements including collection method
c. Details of payer's
   (i) employment circumstances
   (ii) business interests
   (iii) results of property and other searches, details of notices sent to banks and financial institutions, licence, vehicle and watercraft registration searches
d. Consideration of why legal action *not* taken in the case.

4. CSA is satisfied that the payer has persistently and without reasonable grounds failed to pay child support debts

a. Details of contact with paying parent attempting to negotiate the debt over the previous 12 months (note: current standard appears to be three attempts at phone contact over 2 days, in line with Customer Contact PI, which appears insufficient for action of this gravity).
b. Details of the CSA's efforts to collect the debt administratively over previous 12 months, including employer withholding, or garnishee notices to third parties.

c. Details of results of administrative action to enforce debt.
d. Discussion of payer's capacity to meet the child support debt, including any information not outlined above.

5. CSA believes it is desirable to make a DPO

a. Evidence for the reasonable belief that a DPO will make payment of the debt more likely
b. Evidence for flight risk and transfer or dissipation of assets
c. Evidence of consideration of payer's ties to Australia, including family, job and assets.

6. Child support debt: total debt in dollars (excluding late payment penalties)

(PNAPs): Uncredited amounts for Non Agency Payments (these amounts stand to the credit of the payer's child support account, but have not yet been applied to the debt, as they can only be credited towards 30% of the monthly liability when the remaining 70% is paid on time).

ANNEX B—TABLE OF DECISION MAKER REVIEWS

Table 2: Ombudsman review of CSA DPO decisions: Authority of decision-maker

Case ID	Submission template from PI?	DPO template from PI	DPO decision made by delegated officer?	DPO signed by a delegated officer?	Did decision-maker sign the DPO?	Letter correctly identifies DPO issuer?	Comment: (apparent validity of DPO etc)
A	No	No	Yes (JB)	Yes (JB)	Yes	No (BL)	**Valid**; but letter incorrectly identifies decision-maker
B	No	No	Yes (AD)	Yes (AD)	Yes	No (BL)	**Valid**; but letter incorrectly identifies decision-maker
C	No	Yes	Yes (JP)	Yes (JP)	Yes	No (MP)	**Valid**; but letter incorrectly identifies decision-maker
D	No	No	Yes (AD)	Yes (AD)	Yes	No (BL)	**Valid**; but letter incorrectly identifies decision-maker
E	No	No	Yes (SB)	Yes (SB)	Yes	N/A	**Valid**; no letter as payer's address unknown
F	No	No	Yes (AD)	Yes (AD)	Yes	No (BL)	**Valid**; but letter incorrectly identifies decision-maker
G	Yes	Yes	Yes (JP)	Yes (JP)	Yes	No (MP)	**Valid**; but letter incorrectly identifies decision-maker
H	Yes	Yes	Yes (JP)	Yes (JP)	Yes	No (MP)	**Valid**; but letter incorrectly identifies decision-maker
I	No	Yes	Yes (JP)	Yes (MP)	No	Yes (MP)	**Invalid**; DPO not issued by decision-maker
J	No	Yes	Yes (BH)	Yes (BH)	Yes	Yes (BH)	**Valid**
K	No	No	Yes (AD)	Yes (AD)	Yes	No (BL)	**Valid**; but letter incorrectly identifies decision-maker
L	No	No	Yes (HH)	Yes (HH)	Yes	No (GC)	**Valid**; but letter incorrectly identifies decision-maker
M	No	Yes	Yes (JP)	Yes (LA)	No	Yes (LA)	**Invalid**; DPO not issued by decision-maker
N	No	No	Yes (SB)	Yes (SB)	Yes	No (MM)	**Valid**; but letter incorrectly identifies decision-maker
O	No	No	Yes (AD)	Yes (AD)	Yes	No (BL)	**Valid**; but letter incorrectly identifies decision-maker
P	Yes	Yes	Yes (MP)	Yes (MP)	Yes	Yes (MP)	**Valid**
Q	No	No	Yes (HC)	No (AB)	No	No (GC)	**Invalid**; DPO issued by unauthorised officer
R	Yes	Yes	Yes (BK)	Yes (BK)	Yes	No (LA)	**Valid**; but letter incorrectly identifies decision-maker
S	No	Yes	Yes (DM)	Yes (BY)	No	Yes (BY)	**Invalid**; DPO not issued by decision-maker; defect in the DPO (not signed by person named as having made the DPO)
T	No	No	Yes (HH)	Yes (HH)	Yes	No (GC)	**Valid**; but letter incorrectly identifies decision-maker
U	Yes	Yes	Yes (JP)	Yes (JP)	Yes	No (MP)	**Valid**; but letter incorrectly identifies decision-maker
	Yes = 5	Yes = 10	Yes = 21	Yes = 20	Yes = 17	Yes = 5	**Valid = 17**

ANNEX C—RELEVANT EXCERPTS FROM CSA AND ATO LEGISLATION

Section 72D—*Child Support (Registration and Collection) Act 1988*:

72D Registrar may make departure prohibition orders

(1) The Registrar may make an order (a ***departure prohibition order***) prohibiting a person from departing from Australia for a foreign country if:
  (a) the person has a child support liability; and
  (b) the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged; and
  (c) the Registrar is satisfied that the person has persistently and without reasonable grounds failed to pay:
    (i) child support debts arising from a registrable maintenance liability under section 17; or
    (ii) a child support debt arising from a registrable maintenance liability under section 17A; or
    (iii) one or more child support debts arising from a registrable overseas maintenance liability under subsection 128A(1), paragraph 18A(3)(a) or subsection 18A(4) (insofar as subsection 18A(4) relates to subsection 18(1) or paragraph 18A(3)(a); and
  (d) the Registrar believes on reasonable grounds that it is desirable to make the order for the purpose of ensuring that the person does not depart from Australia for a foreign country without:
    (i) wholly discharging the child support liability; or
    (ii) making arrangements satisfactory to the Registrar for the child support liability to be wholly discharged.

(2) For the purposes of paragraph (1)(c), the Registrar must have regard to the following matters:
  (a) the capacity of the person concerned to pay the debt or debts;
  (b) the number of occasions on which action has been taken to recover the debt or debts, and the outcome of the recovery action;
  (c) if subparagraph (1)(c)(i) applies—the number of occasions on which the debts mentioned in that subparagraph had not been paid on or before the day on which they became due and payable;
  (d) if subparagraph (1)(c)(ii) applies—the length of time for which the debt mentioned in that subparagraph has remained unpaid after the day on which it became due and payable;
  (e) such other matters as the Registrar considers appropriate.

(3) A departure prohibition order must be in the approved form.

Section 14S—*Taxation Administration Act 1953*:

14S Departure prohibition orders

(1) Where:
  (a) a person is subject to a tax liability; and
  (b) the Commissioner believes on reasonable grounds that it is desirable to do so for the purpose of ensuring that the person does not depart from Australia for a foreign country without:
    (i) wholly discharging the tax liability; or
    (ii) making arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged;

the Commissioner may, by order in accordance with the prescribed form, prohibit the departure of the person from Australia for a foreign country.

(2) …

ABBREVIATIONS AND ACRONYMS

AAT	Administrative Appeals Tribunal
ACS	Australian Customs Service
AFP	Australian Federal Police
ATO	Australian Taxation Office
CSA	Child Support Agency
CSRCA	*Child Support (Registration and Collection) Act 1988*
DAC	Departure Authorisation Certificate
DHS	Department of Human Services
DIAC	Department of Immigration and Citizenship
DPO	Departure Prohibition Order
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
PI	Procedural instruction
SSAT	Social Security Appeals Tribunal
TAA	*Tax Administration Act 1953*