Child Support System of Australia

Associate Professor Lisa Young
(School of Law, Murdoch University, Perth, Western Australia)

< Abstract >

This paper provides an overview of the development, operation and success of Australia's child support scheme, set in the context of Australian law and Australian family law in particular.

After setting out the Australian constitutional framework in so far as it relates to the power to legislate on family law, the paper traces how Australia moved from a system of State based family laws modelled on English statutes, to a federal system in 1959. However, at this time fault based divorce was still a feature of family law and there were jurisdictional difficulties. To a large extent these issues were overcome with the introduction of the Family Law Act 1975 (Cth) which marked Australia's move to a truly no-fault family law system that was applicable to most families. The paper sets out the Constitutional challenge soft his system and how the state and legislatures acted to make the system as widely applicable as possible.

In addition, it is noted that with this scheme came a system of specialised federal courts presided over by judicial officers with specific family law experience. The paper then sets out those few matters not with in the jurisdiction of the Family Courts. The paper then explores the way the Family Courts are set up to act as a 'helping' court for families and the role of specialised personnel with in the court.

The paper goes on to explain how divorce law works in Australian law today and the basis for the no-fault singular ground of divorce. It moves on to discuss important parts of the Family Law Act 1975 that deal with parenting disputes. This law is very complex and so
only an overview is provided. This includes discussion of the nature of parental responsibility in Australian law, the introduction of compulsory pre-filing mediation, the role of agreements in resolving parenting disputes and the nature of the provisions governing the exercise of discretion when making a parenting order. It would be extremely difficult to read the Family Law Act 1975, Pt VII, and understand how this latter discretion must be exercised: that is, the legislative guidelines governing the exercise of discretion. Indeed, many users of the system and some professional working within it are confused by the provisions. The paper thus explains how these provisions operate in broad terms. The paper goes on to explain briefly the maintenance provisions for both women and children and how those have been impacted by the introduction of the child support scheme. This section concludes by looking in more detail at how the family law system in Australia embraces alternative dispute resolution – known as 'family' dispute resolution. Australia’s significant commitment to ensuring judicial resolution is a last resort is outlined.

At this point, the paper turns to consider why the child support scheme was introduced in the late 1980s. The magnitude of the task of introducing a scheme of administratively based child support is explored and why this involved a two-stage process. The scope of the scheme is then outlined (in terms of whether parents must participate in it). The paper goes on to set out a broad overview of how the scheme works both at an administrative level and in terms of the rationale underlying the substantive provisions dealing with the calculation of child support. This section of the paper explores how the Scheme operates in practice and highlights its particular strengths, including its relative flexibility. Collection of child support payments and arrears is explained as is the question of how parents might give effect to agreement over child support matters. The role of the federal Child Support Agency in the Scheme is also discussed.

The paper then turns to look at Australia’s child support formula in detail. Whereas once the formula could be explained in a few sentences, and calculated on a hand-held calculator, since 2008 Australia has adopted a much more sophisticated formula. The stops in calculation of child support and the rationale underlying
the process are explained in detail in the paper. This highlights that, while relatively complex, very little information is required directly from parents to generate an assessment: this is one of the key strengths of an administrative based formula.

In the next section, the paper outlines the very important process by which parents can seek to depart from the administrative assessment of child support. As the paper highlights, it was never intended that this provide a wide scope for parents to escape the standard formula - rather it requires parents to show a special case which must fit within 10 narrowly prescribed grounds for departure. The paper outlines the more important reasons and notes the highly discretionary task given to government decision makers. The options for challenging such decisions are also outlined. This section of the paper concludes with a discussion of why this process is so significant to this Scheme and its strengths.

In its conclusion, the paper provides some statistics by which the Scheme's success might be measured. It then goes on to list what are argued to be the particular features of the Scheme which have contributed to its success. In summary, these are: the relationship of the Child Support Agency and the Australian Taxation Office; the broad investigative and enforcement powers of the Child Support Agency; the simplicity of the child support formula; and the high quality departure process. Finally, the paper concludes with some suggestions as to areas which could be fairly criticised: the connection between rates of child support and levels of care; recovery of arrears; resources directed to improve the profile of the Child Support Agency; the question of whether reductions in child support and welfare to work changes in Australia might lead to increased poverty in single parent households.

Key words: Australian Family Law, Child Support, Child Maintenance, Parenting Law, Divorce, Departure Applications, Child Support Formula

1. INTRODUCTION

As in other parts of the world, the financial support of children by parents not living with them has been the subject of much public debate, legislative and research activity in Australia. Notwithstanding increased levels of paternal care of children, mothers remain the predominant carers of Australian children\(^1\) and, as in other areas of family law, this has led to something of a 'gender war' in child support debate.\(^2\) Nonetheless, it must be said that Australia has moved a considerable way towards ensuring that both parents make realistic financial contributions to the support of their children. The system that has been in place for over two decades now exhibits both simplicity and a degree of flexibility in its operation. While it cannot be said that there is universal support for the scheme and the government department that delivers it, it is fair to say that, for the moment at least, there are no major calls for reform and there is bipartisan political support for many of the fundamental principles which underpin the operation of the Scheme.

While it is acknowledged that there are increasing numbers of men caring for their children, and women paying child support, at times in this paper reference to fathers and mothers is made to reflect the more common situation. Also, the term 'payer' (for someone paying support) and 'payee' (for someone receiving support) are adopted at times.

---

2. THE AUSTRALIAN FAMILY LAW SYSTEM

2.1 The Australian Legal Context

Australia derived its legal system from the English. Since 1986 there has been no connection between the English legal system and the Australian system, however, they are very similar in nature. Australia is therefore a common law country which utilises the doctrine of precedent and which adopts an adversarial approach to litigation. However, as in many common law jurisdictions, legislation has proliferated and very few areas of law are not now impacted, to some degree, by legislation. Many areas are indeed dominated by complex legislation that seeks to comprehensively regulate the particular legal topic; family law is one such area.

Australia became a federation in 1901 and so there is a federal government and State governments. The Constitution 1901 (Cth) sets out the division of legislative powers. The federal government has limited legislative powers. A very few matters are reserved exclusively for the Commonwealth. In s 51 there is a long list of 'concurrent' powers. These are matters on which the Commonwealth may, if it chooses, legislate. The States retain concurrent legislative powers in those areas unless a) the state law is inconsistent with the federal law, in which case the latter prevails, or b) the federal parliament 'covers the field'. When the federal parliament covers the field, it legislates exhaustively on a topic, with the intention that the legislation shall be the total regulation of the matter in question. If that happens, the States cannot legislate on that topic. Any matter not given exclusively, or concurrently, to the federal parliament, remains within the jurisdiction of the state legislatures.
2.2 The Birth of Australian Family Law

The Commonwealth has concurrent power to legislate in respect of marriage and divorce (s 51(xxi) & (xxii)). However, for many years it chose not to do that, and family law was left to the States. The States, reflecting their English heritage, initially just adopted a system of family law very similar to that operating in England, including various grounds of fault based divorce. Over time, however, the various State systems began to diverge, and by 1959 two States had no-fault grounds for divorce. In 1959 the Commonwealth entered the field of family law by passing the Matrimonial Causes Act 1959(Cth). This was followed by the Marriage Act 1961(Cth). These laws had little effect on marriage, though s 89 of the Marriage Act did provide that children born illegitimate were legitimated by their parents' later marriage.

The impact of the Matrimonial Causes Act on divorce and related matters was however considerable. All the divorce grounds in the different States were consolidated, so there were 14: this included a ground of divorce based solely on 5 years separation. The Act also dealt with ancillary matters, such as maintenance, property division, custody etc, but only where the parents were divorcing. Thus, State laws still had to be used where the parents were not divorcing. This did not present much of a practical problem, however, as both State and Commonwealth laws were administered through State courts.

The legislative reforms of 1959 were, by the 1970s, considered outdated and not meeting the needs of modern Australian society. In 1972 a new federal Labor government came to power and family law was just one of the areas that underwent radical reform. In 1975 the Family Law...
Law Act 1975(Cth) ('the FLA') was passed. The FLA overhauled the substance of family law, as well as creating a federal Family Court of Australia. Thus, there is a federal court system devoted to family law matters, presided over by judicial officers who have a background in family law practice. Within that system there are less senior decision makers (Registrars) who handle simpler matters, Judges and also an appeal court. Appeals from the Full Family Court of Australia go to Australia's most superior court, the High Court of Australia. In terms of substance, the most significant change was the abolition of all of the fault based grounds of divorce, and the introduction of one single ground: irretrievable breakdown of marriage proved (only) by 12 months separation. This 'no fault' philosophy pervades all aspects of the FLA and there is now no context in which marital fault alone can be argued to be relevant to deciding a family law matter.

The FLA initially covered most aspects of family law: divorce, property division, parenting disputes, spousal and child maintenance, dispute resolution as well as related procedural matters (marriage is covered in the Marriage Act). However, not all matters relating to family law fall within the Constitutional legislative power of the Commonwealth (for example the resolution of parenting disputes between parents who have never been married is not related to marriage or divorce and so not covered). However, the States can refer their legislative powers to the Commonwealth4), and this has been used extensively so that most matters thought of as 'family law' are now dealt with under the FLA in the Family Court of Australia.

Thus, Australia now has a system where there are federal Family Courts spread across the country which can deal with most matters

4) The Constitution, s 51(xxxvii).
that one would consider to be 'family law'. Thus, parenting disputes between any parents (whether they were married or not), property disputes between married and de facto partners (including same-sex couples), 'spousal' maintenance (whether the parties were married or not), divorce, marriage disputes and parentage disputes, can all be dealt with in the Family Court of Australia. One notable omission is matters relating to the care and protection of children (ie when children are taken into state care for their protection): in Australia this is not considered family law and remains a matter of state jurisdiction. As we shall see, the one matter now taken largely out of the Family Court of Australia, and the FLA, is child support.

2.3 Family Law in Australia Today

2.3.1 Services

As indicated above, Australian family law is administered in a system of federal courts. In addition to the Registrars and Judges, the court has professionals from the social sciences, known as 'family consultants'. The role of family consultants is broad and is designed both to assist the decision makers in making their decisions, as well as helping parents resolve their disputes without a judicial determination. Family consultants have immunity from suit, like judges, and communications with them are not confidential. There is also a range of non-court based counselling services where accredited counsellors provide help to parents both to resolve their disputes and to deal with their interpersonal issues. The FLA stipulates that judges must always consider the possibility that parents will reconcile, and can order parents to attend counselling. These services therefore play an important role in helping

5) When a matter is simple, it can be dealt with in a federal magistrates courts.
parents through their dispute. In addition, there are also now "family relationship centres". These services are discussed below in the context of alternative dispute resolution.

2.3.2 Divorce

As set out above, the FLA introduced no-fault divorce. The only ground for divorce is 'irretrievable breakdown' of marriage. This can only be proved by 12 months separation. Normally this will be physical separation. However, separation can occur under 'one roof': this is because separation means the breakdown of the marital state. To encourage reconciliation, parties are allowed to reconcile for one period of no more than three months, and still count the time on either side of the reconciliation towards their 12 months. This ensures spouses do not avoid reconciliation for fear of having to wait another 12 months for their divorce.

Because separation is all that is required, there is effectively no defence that can be raised to a divorce. That is, one parent can apply for a divorce and provided they can prove the separation, the other parent cannot oppose the divorce. The court must, however, in granting any divorce, be satisfied that proper arrangements have been made for any children living in the house (this includes non-biological children who are being treated as children of the household at the time).\(^6\)

Divorce law is therefore very simple in Australia. An application is made and, providing the 12 months separation is proved, the order is granted. In the first instance it is provisional, however, after a month it becomes final. At that point the spouses are divorced.

\(^6\) FLA, s 55A.
Divorce has no particular link to ancillary proceedings such as property division, spousal maintenance or parenting disputes. Thus, parents may not divorce, but still seek orders in relation to any of those matters. However, once the divorce order is made, any application for property division or spousal maintenance must be made within 12 months of divorce.

2.3.3 Children

The illegitimacy of a child in Australia has no legal consequence: it is simply irrelevant. Parentage is the important matter, and where this is an issue (such as in child support matters) it is determined in the Family Court under the FLA.7) In terms of parental rights of custody etc, in the absence of a court order to the contrary (and regardless of whether parents are married or not) both parents have parental responsibility for their children (until they turn 18).8) Divorce has no impact on this status. Thus, if parents separate but obtain no court orders, then they each have equal rights and responsibilities in relation to their children. In other words, it is legally no different to when they were together. Indeed, it is the same even if the parents were never a couple. The only thing that can alter this status is a court order. Further, a court order only changes parental responsibility to the extent of the order. Thus, an order as to where a child lives from time to time, does not affect any other parental rights and responsibilities: it only determines where the child will live.

---

7) FLA, Pt VII, Div 12.
8) FLA, s 61C
Where parents have a dispute as to care of their children, they must first attend compulsory mediation\(^9\), before they are entitled to file an application in court. Once in court, there is a 'less adversarial trial' process\(^10\), which aims to increase judicial control over the way the matter proceeds and encourage settlement. If parents reach agreement, they can enter into a parenting plan; since 2004 these have not been legally enforceable however. If parents cannot agree, and the matter proceeds to a judicial determination, then the best interests principle applies: namely, in making any parenting order, the best interests of the child is the paramount consideration.\(^{11}\) In determining what is in a child's best interests, the FLA sets out a list of mandatory considerations. First there are two 'primary' considerations (i) the benefit to the child of a meaningful relationship with both of its parents and (ii) the protection of the child from harm) and then a fairly lengthy list of 'additional' considerations, which includes a catch-all provision at the end, so that any matter relevant to the welfare of a child can be considered by the court.\(^{12}\)

The FLA contains further guidance as to what parenting orders ought to be made: and there is a heavy emphasis on shared parenting outcomes. The FLA, as we have seen, talks about 'parental responsibility for children'. In the past, the court made orders for 'guardianship' (responsibility for major long term decision such as education, religion and name) and 'custody' (day to day care of the child). These terms have disappeared, but orders still carve up parental responsibility in this way. The FLA includes a presumption that there will be 'equal

---

9) This is known as 'family dispute resolution'; FLA, Pt VII, Div 1, Subdiv E.
10) FLA, Pt VII, Div 12A. For further discussion see L Young and G Monahan, Family Law in Australia, 2009, 7th ed, Lexis Nexis Butterworths, Chatswood, [7.74]-[7.76].
11) FLA, s 60CA
12) FLA, s 60CC
shared parental responsibility' (ESPR);\(^{13}\) this is effectively guardianship. In other words, in most cases\(^ {14}\) there will be joint responsibility for major long term decisions. Once an order for ESPR is made (and this will very often be the case) the court is compelled to consider whether 50/50 shared physical care would be in the child’s best interests and practicable and only move to considering an alternative parenting regime where the answer to one of these questions is negative.\(^ {15}\) This does not mean shared care must be ordered, just that it must be considered. If equal shared care is not ordered, then 'substantial and significant time' with both parents must be considered.\(^ {16}\) Thus, while most judicially determined cases still do not result in an equal shared care outcome, it is certainly increasingly common. Indeed, many in the community believe (mistakenly) that there is a legal presumption in favour of 50/50 shared physical care and much negotiation is carried out on this basis.

Many parents in Australia obtain no parenting orders: thus, for many, the technical legal situation is that they have equal parental responsibility for their children. For those that do obtain orders, it is quite typical that both parents have ESPR and that day to day care of the children is divided between the parents, with one parent having more care than the other. When a child is living with a parent, that parent has responsibility for making all decisions of a day to day nature. Whether one parent will have to pay the other child support, depends on a range of factors, discussed below.

\(^ {13}\) FLA, s 61DA.

\(^ {14}\) The presumption of ESPR does not apply where one of the parents has engaged in domestic violence (s 61DA(2)) or where a court is satisfied that ESPR is not in the child’s best interests. However, it may still be ordered.

\(^ {15}\) FLA, s 65DAA(1).

\(^ {16}\) FLA, s 65DAA(2).
2.3.4 Maintenance

Prior to the introduction of the child support scheme, child maintenance was covered by the FLA, just as spousal maintenance still is. Both forms of maintenance were premised on a needs versus capacity to pay approach. Thus, a child (or spouse's) financial needs were assessed, accounting for any income they might have: the shortfall being the relevant amount for maintenance proceedings. Then, the same process was applied to the person against whom the application was made: in other words, only if the 'payer' had excess income (once they met their own needs) could an order be made against them. Thus, it was a question of the payee's needs versus the payer's capacity to pay. While a parent can still apply for spousal maintenance, it is very rare, and generally only ordered where one of the parents has a very high income. This is in large part because of the introduction of the Child Support Scheme. Now that fathers are paying more realistic levels of child support, there is little left over to pay spousal support, even if the mother can establish need.

The child maintenance provisions remain in the FLA, but since the introduction of the Child Support Scheme, they do not apply to children under 18. Any parent seeking financial support for a child under 18 must apply for child support (they cannot apply under the FLA): child maintenance under the FLA now only applies to adult children completing their education (university for example) and adult children with a mental or physical disability who cannot support themselves.\textsuperscript{17}

\textsuperscript{17) FLA, s 66L.}
2.3.5 Alternative Dispute Resolution

Since its entry into family law in 1959, the federal government has always sought to encourage parents to resolve their differences through means other than judicial determination, including counselling. The following are the main processes and services available to parents:

- Counselling – set out in Pt II of the FLA, this refers to non-court based services to help people deal with 'personal and interpersonal issues' surrounding marriage, separation and divorce. This is available to parents at any time and the court may also order attendance by a party at counselling at any time in relation to child matters. A court cannot make a parenting order unless the parents have attended counselling. Communications in counselling are generally confidential.

- Family Consultants – these have been referred to above and they may provide counselling as well as dispute resolution services.

- Family Dispute Resolution – this is a brand of compulsory mediation that is required prior to filing any parenting application in court. The government has established Family Relationship Centres around the country staffed by accredited Family Dispute Resolution Practitioners and they provide three hours of free mediation. There is no prescribed form of mediation, but 'child focussed' and 'child inclusive' mediation are two models that have been developed and attracted considerable support.

18) FLA, s 13C
19) FLA, s 65F(2).
20) FLA, s 10D.
21) FLA, Pt VII, Div 1 Subdiv E. Unless there is violence involved, parents must obtain an appropriate certificate of attendance before filing proceedings in family court.
22) L Young and G Monahan, Family Law in Australia, 2009, 7ed, Lexis Nexis Butterworths,
Conciliation - the Family Court has long included pre-trial conciliation processes as a mandatory step on the path to trial. They are presided over by a judge or Registrar and a Family Consultant and if agreement is reached consent orders can be made. For example, there is generally an early 'case assessment conference' and where there are also property matters in dispute there will be a compulsory final conciliation conference before trial.

It must be remembered that the Court has considerable powers to compel parties to attend these various processes and so may at any stage in a parenting dispute send the parties to some form of alternative dispute resolution. About 95% of applications filed in court are resolved without a judicial determination.

3. A BRIEF HISTORY OF THE INTRODUCTION OF AUSTRALIA'S CHILD SUPPORT SCHEME

By the 1980s it became apparent in Australia that the discretionary system of court ordered child maintenance set up under the FLA was not serving children, or their primary carers, well:

- Payments were generally unrealistically low
- There was little consistency across cases
- Orders did not account for future increases in costs of living
- Paying parents were often simply ignoring orders
- Enforcement proceedings were expensive and protracted
- Research data was emerging confirming that many women in sole parent families were living in poverty and that the payment

Chatswood, [2.56].
of child maintenance had become all but an optional act for fathers.23)

The net effect was that the government was being forced to pay considerably more than it needed to in welfare payments to single mothers. Child maintenance was seen as a 'top up' to pension benefits, rather than the other way around. As a consequence, in the 1980s a number of government reports recommended a new system be introduced.24) Thus, with an eye to increasing the living standards of children of separated parents and reducing the spiralling welfare bill, the government introduced what is now referred to as the Child Support Scheme, through two key pieces of legislation: the Child Support (Registration and Collection) Act 1988(Cth) ('the Registration Act') and the Child Support (Assessment) Act 1989(Cth) ('the Assessment Act').

The magnitude of this innovative change cannot be underestimated. Indeed, it was so radical that implementation of the Scheme had to be undertaken in two stages. Under the Registration Act, Stage 1 (which began on 1 June 1988) involved the creation of a 'Child Support Agency' ('the Agency') (originally part of the Australian Taxation Office but now housed in the Commonwealth Department of Human Services) and the development of an administrative mechanism for registering and collecting child maintenance payments. This was initially applied to existing child (and spousal) maintenance orders. Stage 2, which began on 1 October 1989, saw the introduction of an entirely new child support 'formula' which applied prospectively. From this date, all new cases had child support calculated according to a statutory formula.

Thus, all payments can now be collected by the Agency, but for a long time there were two types of cases: Stage 1 cases were court ordered child maintenance that was being collected through the Agency, whereas Stage 2 cases involved an administrative assessment of child support according to a statutory formula, also able to be collected by the Agency. Key to this system was its mandatory nature: parents could not elect to have child maintenance determined by the court; if a case fell within Stage 2 then the formula applied. As it is now more than 18 years since the Scheme began, there are no longer any Stage 1 cases: thus, all child support in Australia is now assessed according to the administrative formula.

This is not to suggest that parents are compelled to be part of the Scheme. There remains a strong focus on encouraging parents to agree about child support, and it has always been the case that parents can arrange matters privately. However, where a parent is in receipt of the relevant government parenting benefits, to ensure the government purse is not improperly called upon, social security legislation requires that the parent must take reasonable action to obtain child support from the other parent. Thus, government benefits are designed to 'top up' child support, rather than the reverse.

Since its introduction, the Scheme has undergone considerable amendment, however, many of the fundamental features remain the same. The most significant reforms resulted from the Ministerial Task force on Child Support, which reported in 2005.25) In particular, significant

changes were made to the child support formula.\textsuperscript{26} The reforms, which were implemented in waves, have been effective since 1 July 2008.

\textbf{4. THE CURRENT CHILD SUPPORT SCHEME IN OVERVIEW}

As indicated above, child support is now a largely administrative matter in Australia. As we shall see, there is very little involvement of the court. The Commonwealth Department of Human Services, Child Support administers the Scheme (for ease of reference it is hereafter referred to as 'the Agency'). It is perhaps easiest to understand the Scheme by considering it in the way that it would present to a user of the system – a parent.

Before turning to how the Scheme operates, it is important to note that, while only parents\textsuperscript{27} can be assessed to pay child support, non-parent carers of children can apply for child support for the children in their care. So, for example, a grandparent caring for a child may seek child support from the parents. The Scheme operates all but identically for these cases, except that, in deciding how much child support should be paid, the financial circumstances of the third party carer are quite naturally not relevant.

As indicated above, there are essentially two aspects to the Scheme: one is collection and enforcement, the other is administrative assessment of the quantum of child support payable. While many parents choose

\textsuperscript{26} For a detailed discussion see L Young and G Monahan, Family Law in Australia, 2009, 7\textsuperscript{th} ed, Lexis Nexis Butterworths, Chatswood, [11.19]-[11.26].

\textsuperscript{27} This includes adoptive parents.
to let the Agency assess, collect and enforce the payment of child support, this is not universally the case. Having said that, 'opting out', as it were, is only really available where the parties agree. If one parent wishes to have child support administratively assessed, collected and enforced, then they will be able to choose that avenue regardless of the views of the other parent.

Where parents do agree on the amount of child support that should be paid, there are a few options open to them. Parents can choose to arrange matters between themselves privately if they wish, with no Agency involvement, provided neither is in receipt of sole parenting benefits (in which case an application for child support may be a pre-condition to receiving the pension).\(^28\) Alternatively, parents might choose to obtain consent orders for child support from the court (where one of the parents is in receipt of a sole parent pension then the court must give reasons for its decision). However, the court is not obliged to make these consent orders, and must be satisfied they are 'proper'.\(^29\) Finally, the parties can enter into a child support agreement, which the Agency must accept and register: this gives it the effect of a court order.\(^30\)

If parents cannot agree on the quantum of child support, then there will be an administrative assessment which determines the amount of child support that will be paid in respect of a child. The details of the formula are set out later in this paper. At this point it is worth noting that the rate of child support will be affected by the following factors (only):

---

28) Assessment Act, ss 118(4) and 126(2).
29) *Logman and Logman* (1990) 14 Fam LR 320; FLC 92-158
30) Assessment Act, s 95.
The parents' respective incomes
The number and ages of the children (who must be under 18)\(^{31}\)
The number of nights per year the child/ren spend with each parent
The number and ages of any other dependant\(^{32}\) minor children in a parent's care
Whether either parent has any other child support liabilities

Thus, relatively little information is required to generate an assessment. While some of that information must be collected from parents, generally the income figure used is the most recent taxable income of the parent.\(^{33}\) The Agency's links with the Australian Taxation Office enable it to obtain that information directly, thus overcoming the problems faced in the UK with obtaining income information.\(^{34}\)

The intent was always that, once an assessment was issued, in the vast majority of cases this figure would be used, and there would be little opportunity for a parent to seek a change to an administrative assessment. There have been some legislative changes in this regard over the years however, it remains true to say that assessments will only be varied in very limited circumstances. The Assessment Act provides for 'departures' from the assessment, a process known as 'change of assessment' within the Agency. This is primarily a process of administrative review and is discussed further below. Only about 5% of cases go through a change of assessment process, meaning that most parents rely on the administrative assessment. Having said that,

\(^{31}\) There is a short extension for children in the last year of their secondary education who have already turned 18; in that case, the child remains eligible for support until the completion of their school year.

\(^{32}\) This does not include the care or support of any step-children, unless there is a court order in place requiring the parent to pay step-child maintenance

\(^{33}\) The Assessment Act mandates various 'averaged' figures that must be used in the event of there being no relevant taxable income figure available.

the change of assessment process is crucial from a legal point of view as it is the only point at which any discretion is exercised in the assessment of child support and it can, in very limited situations, lead to a court decision about the rate of child support appropriate to a particular case.

Once an assessment for child support has issued, the next step in the process is collection and disbursement of the funds. Consistent with the aim of parents arranging matters privately, the parents may choose to organise payment between themselves. If, however, one of them wishes the Agency to collect and distribute the child support, that option is also available.\textsuperscript{35)} If the Agency is collecting and disbursing child support, this can be done in one of two ways. Either the paying parent can pay the money direct to the Agency, which then disburses it monthly to the payee, or (where the person is not self-employed) the Agency can deduct the child support from a parent's pay, much the same as tax is deducted at source. There are also circumstances in which a paying parent can claim a payment to a third party (such as a school) as a credit against their child support liability. This is known as a non-Agency payment and can either be done by agreement between the parents in respect of any payment or, where there is no agreement, the paying parent can claim this automatically for a very limited range of specific payments (such as school fees or mortgage repayments).

While many parents choose to pay privately, for many other parents using the Agency provides a valuable mechanism for reducing tension and ensuring accuracy in payments. The parents do not need to deal

\textsuperscript{35)} If one parent wishes to have child support paid via the Agency, the other party cannot resist that request
with each other, thus reducing the opportunities for hostile interactions, and there is a precise record of every payment made, again reducing the likelihood of disputes over amounts paid and clarifying any unpaid arrears.

Of course, many paying parents do still fall into arrears with their child support. The Agency plays a significant role in the enforcement of child support liabilities, through taking action to recover unpaid arrears. Child support assessed by the Agency is a debt owed to the Commonwealth, and thus the federal government is entitled, but does not have to, enforce the debt. This means that parents are not faced with the expensive option of going to court to try to enforce payment of the debt. If a payee wishes, however, they can take steps to recover a debt where the Agency does not.\(^{36}\) The Agency has very extensive powers to recover debts, some of which can be actioned without any court involvement. The Agency’s powers of recovery include:

- Garnishing wages at source
- Seizing and selling property
- Sequestration of estates
- Collection of moneys held by third parties on behalf of the debtor (for example, money in bank accounts, proceeds of sale due from the sale of property etc)
- Deduction of money from government benefits due to the debtor, veterans’ pensions and allowances and from tax refunds (intercepting tax refunds due to payers of child support is an extremely common and effective way of recovering child support arrears)

A more recent addition to the arsenal of enforcement options for the

\(^{36}\) Registration Act, s 113A
Agency is the introduction of 'departure prohibition orders'. Under the relevant provision\(^{37}\) the Agency can make an order prohibiting a payer from leaving the country, where the payer concerned is persistently, and without good cause, in arrears and where to allow them to leave the country would jeopardise there recovery of the debt.

Thus, if a parent wishes, they can have the Agency calculate and collect their child support from the other parent, and leave to the Agency the difficult process of enforcing the payment of any arrears. The Agency will continue to pursue a debt regardless of the child support case ending: neither bankruptcy nor death discharges the debt.

5. THE CHILD SUPPORT FORMULA IN DETAIL

In its first iteration, the child support formula was strikingly simple. This had its attractions, when one considers the problems faced in the UK. In that jurisdiction, an attempt was made to develop a much more nuanced formula: an attempt which failed spectacularly. It has since been recognised that the Australian formula could build in more complexity, to achieve greater fairness, without compromising on the simple and efficient administration of the Scheme. The current formula has been in operation since 1 July 2008. There are a number of variations to the formula, to fit various different scenarios. For example, there is a formula for cases where the child is cared for by a non-parent and where a person paying child support has more than one case (ie where they are paying child support to two separate payees). The standard formula, which applies where there is only one child

---

\(^{37}\) Registration Act, s 72D
support case and the only carers are parents, is certainly much more complex than its predecessor (one now needs to access an online calculator to do the calculation). Having said that, it requires only minimal information to calculate an assessment using such a calculator.

In broad terms, the formula calculates a cost of the children, based on their ages and their parents’ combined income. It then apportions that cost between the parents, according to their share of combined parental income. In doing so, it allows for any costs already met by each parent by having care of the children. An attachment setting out the steps in the formula in more detail is set out in Appendix 1. In Appendix 2 there is a scenario set out to show the formula in operation.

There are a number of underlying assumptions to the formula. First, parents should share in the costs of raising their children proportionate to their share of combined parental income. The most obvious example of this is where there is 50/50 shared care. Many parents would assume there would be no child support payable in such a situation. However, because support is relative to share of parental income, that is not the case. If one parent has a much greater income than the other, then they will pay that other parent child support. If it were otherwise, the level of support of children would depend on which parent’s house they were in. This would not ensure continuity of financial care of the child. It is intended that children have a certain level of support (based on their parents’ combined incomes) that can be maintained in both households; thus, the parent with the lesser income requires child support.

Second, the formula assumes that the costs of children vary according to parental income, however, it is not a linear and unlimited relationship.
Thus, as income increases, while the dollar amount spent on children may increase, the overall proportion of income spent declines. Further, there is a point at which expenditure does not continue to increase. As part of the formula, there is a table which provides figures for the costs of children according to combined parental income; this has a 'cap' built into it. This results in there being a maximum cost for children in the formula.

Third, the formula assumes that the costs of children increase with age. The formula recognises this by allowing for greater costs where a child is 13 and over. Notably, the formula does not assume that parents have childcare costs (this is dealt with through the change of assessment process discussed below). The ages of the children are built into the table of combined parental income, thus rendering a cost of children based on these two factors, age and combined parental income.

Fourth, the formula presumes that the costs of children do not increase in direct proportion to the number of children. Thus, the 'economies of scale' of having more than one child are built into the table referred to above, and no extra cost is added for having more than three children. This acknowledges that parents ultimately have a limited amount they can spend on children and this will be divided between those children where they are numerous.

Fifth, the formula assumes that parents who have significant care of their children are already meeting significant costs of the children, and this should be taken into account when assessing their child support. Thus, if a parent has, say, 70% of the combined parental income, they should be meeting 70% of the overall costs of the children. If they have 24% care of the child, then the formula assumes they will already
be meeting 24% of the costs of raising the child. The parent will need appropriate accommodation, furniture, vehicles, and will be feeding and meeting the other costs associated with having their children over that period. Thus, when calculating the child support, they will get credit for meeting these costs.

Sixth, there is a presumption that parents with care of other dependant children will also support those children financially according to their income. Thus, a paying parent with a low income (who therefore has a low rate of child support) will receive a much smaller reduction in child support when they have a child with their new spouse, than a parent with a high income paying higher child support. This reflects the notion that all children should be treated equally.

So, as the above shows, the formula, while complex to explain, requires only limited information to generate an assessment. That assessment shares the notional cost soft he children between the parents. Many parents complain that the notional costs are not appropriate in their case, however, these costs are based on research specifically undertaken for the purpose of reviewing the operation of the Scheme. The aim of the Scheme is to provide a generic cost for children of similar ages with similar combined parental income, and to share that between the parents according to their share of income. In this way the Scheme seeks to ensure that there is continuous, and appropriate, financial support of children, regardless of where they are living from time to time.
6. ADMINISTRATIVE REVIEW OF CHILD SUPPORT ASSESSMENTS

Parents (or third party carers) who are unhappy with a child support assessment can apply to the Agency to have the assessment changed.\(^{38}\) This application must be made direct to the Agency (not court) and the outcome will be determined by a delegate of the Registrar of the Agency, known as a Senior Case Officer ('SCO'). Legal representation is not permitted and the process involves an investigation by the SCO, generally involving multiple conversations with each party: there is no hearing as such.

There are only 10 'special circumstances' that warrant a change of assessment: one of these grounds \textit{must} be established. The SCO must then decide what change, if any, is and equitable (taking account of statutorily prescribed criteria) and also be satisfied that any such change is 'proper' having regard to the interests of the community. The latter consideration ensures that decisions are made which do not result in government benefits payable to a parent being increased\(^{39}\) in circumstances where that is not proper.

In line with other officers of the Agency, SCOs have considerable investigatory powers. In particular, they can:

- Issue a notice to any third party (such as an employer, bank or accountant) requiring them to provide documents or information about a parent or an associated person (such as a partner of a parent), and

\(^{38}\) Assessment Act, s 117.
\(^{39}\) As child support decreases, a parent’s entitlement to government parenting benefits may increase
• Access a range of databases to obtain information about a parent
  (eg passport records to see how frequently a parent travels overseas,
  vehicle registration details)

As most applications for a change of assessment are based on claims
about the other parent’s income or financial resources, these powers
are extremely important and relieve the applicant parent of having to
obtain information they could not generally access.

The 10 circumstances that can be relied upon in seeking a change
of assessment are set out in s 117 of the Assessment Act. Two of the
grounds are rarely used. The remaining 8 are as follows:

• High costs of contact – where a parent spends more than 5% of
  their income in a year facilitating contact with their children (eg
  airfares and hotel costs) then they can apply for a reduction based
  on the costs that exceed the 5% threshold
• Special needs – where a parent is meeting special needs costs of
  a child (most commonly medical or orthodontic costs) and those
  costs significantly increase the overall costs of raising the child,
  then the parent can apply to have that taken into account in the
  assessment
• High education or training costs – this is typically used to deal
  with significant private education costs. This only applies where
  there is (or was) an agreement as to the particular education or
  training
• Income of a child – where the child the subject of the assessment
  has a significant income, or assets, this may be considered to
  reduce the child support paid in respect of them. This is usually
  applied where a child has left school and entered the workforce
  before turning 18
· High costs of child care - parents with care of young children the subject of a child support assessment, who need childcare to work, can apply for a change where their costs exceed 5% of their income in a year: the rationale is that the child care costs increase the overall cost of raising the child

· Special expenses - where a parent has necessary and unusual expenses (such as medical expenses) and this affects their ability to support their child, they can apply to have this factored into the assessment. This accounts for two grounds of departure, as it can include the costs of supporting a legal dependant not factored into the assessment

· Income, assets, financial resources, or earning capacity of a parent - parents can apply on the basis that the assessment is not fair based on one or more of these matters. As indicated, this is by far the most commonly used ground for change and covers both simple matters (like changes in employment) and complex matters, such as ascertaining the true financial position of self-employed parents who run their income through trusts/companies. It will also be useful where a parent is asset rich but income poor and to consider situations where parents have voluntarily given up employment to avoid being assessed for child support.

While one of these grounds must be established, as indicated above, the ultimate assessment of child support made by the SCO is discretionary. The prescribed considerations when exercising that discretion are aimed at ensuring that, having regard to the overall financial situation of both parents, and the special circumstances of the case, there is a fair sharing of the costs of the relevant child/ren between the parents. The highly discretionary nature of this decision means, of course, that two different SCOs might well come to quite different decisions. If a parent is unhappy with a SCO's decision, they
can 'object' to it.\textsuperscript{40} The Objections Officer is another delegate of the Registrar who simply retakes the decision: that is, it is a merits review carried out by another Agency officer. If either parent is unhappy with the outcome of the objection process, they can then apply to an independent tribunal to have the matter reconsidered. The Social Securities Appeal Tribunal, which hears a range of appeals from government decisions, again engages in a merits review of the matter. This will be the end of the line for most parents, as a matter can only then be appealed to court, if there is a 'matter of law' at issue. Thus, if a parent simply disagrees with how the Tribunal has exercised their discretion, or a finding of fact, no appeal lies. Most appeals will not involve a matter of law and so there are very few cases that now find their way to the courts.

The change of assessment process is a significant aspect of the Scheme, as it is the one point in the system where a decision maker can look at the parents' situations in overview and exercise a discretion as to the quantum of child support that should be paid, taking into account the particular circumstances of the case. While there has been some criticism of this process by parents, it must be remembered that the government is, in effect, providing a free dispute resolution service, into which it puts considerable resources. Trained officers (quite a number of whom are qualified lawyers) spend considerable time considering a case: they handle the case from its inception and so can tailor the precise process they adopt (within specified guidelines) according to the nature of the case. They have multiple interviews with the parents, independently obtain a range of information, speak to employers and other third parties where necessary, discuss the

\textsuperscript{40} This is just one example of a parent's right to object to an Agency decision. Objections can be made to a range of decisions.
potential outcome with the parents before finalising a decision and then provide a detailed written decision outlining their reasoning. Further, there is no filing fee. While parents cannot easily take a matter to court, they have multiple free opportunities to have their case reviewed, without the need for expensive lawyers and with the necessary investigation able to be carried out at the expense of the government.

7. CONCLUSION: SUCCESSES AND CHALLENGES

Following are some statistics from the 08/09 figures produced by the Agency:

· $6.54 was transferred to customers for each Agency dollar spent
· 768,856 active cases for the year involved 1.15 million children
· 53.2% parents in active cases agree to pay child support privately
· 87.3% of cases are by formula assessment ie not agreement
· Something over 12% of paying parents are women
· Those paying child support privately have substantially higher incomes than those using the Agency to collect
· The median income of a paying parent was $40,677, and the median income of a receiving parent was $26,967
· 11.7% of paying parents are receiving unemployment benefits (much higher than the national average)
· In 36.1% of cases the paying parent pays the minimum amount of child support (currently $370/year)
· $4,169 was the annual average child support rate; this figure was $5,312/year if you take out those cases paying the minimum rate
· The average child support rate for 1 child was $64/week; $102/week for 2 and $117 for 3 children
Since 1988 96% of all child support payments have been collected or discharged being over $29 billion.

· The total debt owed to the Agency was $625.4 million - over half of these represented parents who owe more than $10,000.
· 38.1% of overdue child support was owed by parents with an annual income under $12,000.

While it has its critics, the Australian Child Support Scheme has a number of interesting features which contribute to its relative success.

First, there is the relationship the Agency has with the Australian Taxation Office (ATO). While the Agency is no longer housed within the ATO, having direct access to parent's financial information provides numerous benefits for the operation of the Scheme. Assessments can be quickly generated without input from the parents as to their income. Even where there is no recent taxable income information, the legislation permits 'deemed' incomes to be used which is an old taxable income figure increased to account for inflation, and which stay in place until they are overridden by the lodgement of the relevant tax return. Further, when parents do provide income information, this can be reconciled against later taxable incomes. Indeed, even before that happens, access to ATO records may enable the Agency to identify that an estimate of current income by a parent is incorrect, allowing it to be overridden by the Agency. When in the change of assessment process, SCOs may access ATO records to put together a picture of a parent’s financial situation that is not immediately apparent from a parent’s taxable income for a given year. For example, the tax return may show an income distributed to the parent by a trust: ATO records will provide

41) There are certain circumstances in which the Agency will accept temporary estimates of reduced income from a parent.
the details of the income earned by that trust and to whom it was distributed. Other important information, such as voluntary payments into pension schemes, can be ascertained from viewing tax documents. In other words, understanding the financial situation of a self-employed person is aided greatly by having liberal access to tax records for parents and those associated with them. As Payment Summaries can also be accessed through the ATO, this can assist even where the person is not self-employed.\(^{42}\)

Second, the broad powers given to the Agency both in terms of investigation and enforcement help ensure fairness. While many parents will do the right thing, there will always be a small group that seek to evade the Agency and the fair application of the formula so being able to access information about them without their co-operation is of great assistance.

Third, the relative simplicity of the formula is another strength of the Scheme. While it is conceptually quite difficult, armed with relatively little information an assessment can be generated: parents can go online to the Agency website and calculate for themselves potential child support liabilities. Moreover, it does not require much controversial information to be gathered from parents.

Fourth, the limited but high quality change of assessment process ensures both that special cases can be addressed individually and that parents are spared the expense of court proceedings. To have an entirely discretionary, court based system, has not worked, as history shows. It is slow, too expensive for the average person and produces

---

42) A Payment Summary is the statement issued by an employer to each employee at the end of the financial year setting out the gross amount paid to them and the tax deducted.
inconsistent outcomes. To have a formula that provides a standard outcome for the average case, with a tailored service for cases with special circumstances, achieves a fair balance for parents. Currently, the Agency’s goal is to have change of assessment applications decided within 35 days of the application being lodged. As the case is run by the SCO from the time the lodged file is allocated to them, they can ensure that simple cases are resolved quickly and more complex cases have the necessary time devoted to them.

However, no system is going to please everyone: notwithstanding the stated desire of many parents to ensure that their children are properly supported, in many cases parents see their interests as conflicting. However, the goal should not be to keep parents happy. With strong, bipartisan political support it is possible for a government to implement a system of maintenance for children that goes some way to ensuring that children and sole parents are not left in poverty, that the state does not have to bear too great a financial burden and that parents share fairly the financial support of their children. It is a matter of political will. The Australian Scheme has certainly come a long way towards meeting those goals but there remain some areas that present ongoing challenges:

- Because the payment of child support is tied in part to the number of nights care each parent has, there is the problem of parents seeking greater care, or trying to stop the other parent having more care, to achieve a change to child support. This does not promote the best interests of children, as care should be determined by what is best for them, not a desire to reduce (or increase) child support.
- While the Agency’s record in debt recovery is good, there are still
considerable resources spent in this area and in the current global financial situation the Agency, like many government departments, faces a shrinking budget.

- The Agency struggles to maintain a positive profile due to the intrusive nature of its activities. It would be one of the most reviled government departments. Many customers hate the Agency and this creates the need to invest considerable energy and resources into trying to keep customers satisfied.

- While many are happy that child support rates generally decreased during the last wave of reforms, this together with the introduction of new 'welfare to work' laws which reduce sole parent pensions for parents who choose to stay at home and care for their children rather than work, could undermine the goal of child support to lift sole parent families out of poverty.43)

APPENDIX 1

CHILD SUPPORT FORMULA

STEP 1 - Determine each parent’s adjusted taxable income. This is usually their last taxable income. Certain tax deductions are disallowed at this point (e.g., investment losses).

STEP 2 - Deduct from this the self-support amount for the relevant year (in 2011 this figure is $20,594). This is an amount allowed for each parent for their basic living needs.

STEP 3 - Make a further deduction if the parent has a ‘relevant dependant’ i.e., a biological or adopted child living in their home. The figure derived is called the parent’s ‘child support income’.

STEP 4 - Add the two child support incomes of the parents to achieve the combined parental income.

STEP 5 - Determine each parent’s ‘income percentage’, that is, the percentage they have of combined parental income.

STEP 6 - Calculate the costs of the children. At this point a table is referred to which will give a figure for the costs of the children based on their ages and the combined parental income.

STEP 7 & 8 - Calculate each parent’s ‘percentage of care’ of the children and the resultant ‘cost percentage’. In simple terms, this translates a number of nights care of a child into a presumed percentage of the overall costs of raising a child. For example, a parent with 50 nights of care a year will fall into the band of less than 14% care of a child. Parents with less than 14% care are assumed to have a nil cost percentage; that is, it is assumed that in having that care they are not meeting any significant costs of the child. However, a parent with 20% care of their child falls into
the percentage of care band of 14% – 34.9%, and all parents in this band are assumed to be meeting 24% of the costs of the children in their care. Obviously, the other parent has the balance of the percentage of care (ie 100% or 76% in the two examples given).

STEP 9- Calculate the child support percentage by taking the cost percentage away from the income percentage. Thus, if a parent has 50% of the income, they should be meeting 50% of the costs. If their cost percentage is 24% (ie they are presumed to already be meeting 24% of the costs through shared care) then their child support percentage will be 26% (50%–24%).

STEP 10 - Apply the child support percentage to the cost of child. Thus, in our example, if the costs of the child were $10,000, and a child support percentage of 26% were applied, this would result in a payment of $2,600/year in child support.
APPENDIX 2


Amanda earns income in her full-time job. For last financial year, the taxable income shown on her payment summary was $42,000. Phil receives income support from Centrelink. In the last financial year, his income was $15,550.

They have two children—Fran is 14 and Jack is 11. They do not have any other relevant children.

The children stay with Amanda during school holidays and some weekends, which equates to about 80 nights a year (between 14-34 per cent care). Phil has the children the rest of the time.

<table>
<thead>
<tr>
<th>Step 1: Each parent’s child support incomes</th>
<th>Amanda</th>
<th>Phil</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work out each parent’s adjusted taxable income</td>
<td>$42,000</td>
<td>$15,660</td>
</tr>
<tr>
<td>Deduct the self-support amount from each parent’s adjusted taxable income</td>
<td>- $20,594</td>
<td>- $20,594</td>
</tr>
<tr>
<td>Deduct a relevant dependent amount</td>
<td>- $0</td>
<td>- $0</td>
</tr>
<tr>
<td>Deduct a multi-case allowance amount</td>
<td>- $0</td>
<td>- $0</td>
</tr>
<tr>
<td>Each parent’s child support income</td>
<td>= $21,406</td>
<td>= $0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Step 2: Parents’ combined child support income</th>
<th>Amanda</th>
<th>Phil</th>
</tr>
</thead>
<tbody>
<tr>
<td>Add each parent’s child support income together</td>
<td>$21,406</td>
<td>$0</td>
</tr>
<tr>
<td>Combined child support income</td>
<td>= $21,406</td>
<td></td>
</tr>
</tbody>
</table>
### Step 3: Each parent's income percentage

<table>
<thead>
<tr>
<th>Amanda</th>
<th>Phil</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each parent's child support income</td>
<td>$21,406</td>
</tr>
<tr>
<td>Divide each parent's child support income by the combined child support income</td>
<td>1</td>
</tr>
<tr>
<td>Multiply this amount by 100</td>
<td>x 100</td>
</tr>
<tr>
<td>Each parent's income percentage</td>
<td>100%</td>
</tr>
</tbody>
</table>

### Step 4: Each parent's care percentage

<table>
<thead>
<tr>
<th>Amanda</th>
<th>Phil</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each parent's care percentage</td>
<td>21%</td>
</tr>
</tbody>
</table>

### Step 5: Each parent's cost percentage

<table>
<thead>
<tr>
<th>Amanda</th>
<th>Phil</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each parent's cost percentage</td>
<td>24%</td>
</tr>
</tbody>
</table>

### Step 6: Each parent's child support percentage

<table>
<thead>
<tr>
<th>Amanda</th>
<th>Phil</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each parent's income percentage</td>
<td>100%</td>
</tr>
<tr>
<td>Deduct each parent's cost percentage</td>
<td>24%</td>
</tr>
<tr>
<td>Each parent's child support percentage</td>
<td>+ 76%</td>
</tr>
</tbody>
</table>

### Step 7: The costs of the children

<table>
<thead>
<tr>
<th>Fran and Jack</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total cost of all the child support children (using Table C)</td>
</tr>
<tr>
<td>Cost of each child (divide the total cost by the number of children)</td>
</tr>
</tbody>
</table>

### Step 8: How much child support Amanda pays to Phil

<table>
<thead>
<tr>
<th>Amanda</th>
</tr>
</thead>
<tbody>
<tr>
<td>The parent’s child support percentage</td>
</tr>
<tr>
<td>Multiply this percentage by 100</td>
</tr>
<tr>
<td>Multiply this amount by the cost of each child</td>
</tr>
<tr>
<td>Child support payable for each child per year</td>
</tr>
</tbody>
</table>
BIBLIOGRAPHY


