



‘Special circumstances’ in child support departure applications and the very wealthy

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Australia’s formula for calculating child support has an inbuilt ‘cap’, the result of which is that there is a maximum liability for child support in any case. The legislation also provides a process by which parents can seek a departure from the normal application of the formula. There are a number of limited grounds for departure, one of which relates directly to the ‘income, property and financial resources’ of the parents. A question which has arisen in some cases is whether the mere fact of a very high income of a parent is sufficient to establish a ground for departure. All of the grounds for departure require that the applicant show ‘special circumstances’. Given the formula relies on income, and has a cap on the costs of children tied to combined parental income, where a parent is already paying the maximum possible rate of child support, does the mere fact of a very high parental income (or indeed extreme wealth) amount to a special circumstance? Different judicial officers have answered this question differently. This paper considers this question, the case law and argues that a special circumstance requires something more; that is, something more than the normal and intended operation of the formula. Further, the paper identifies flaws in decision making in this area which influence how the provisions are applied more generally.

Introduction

As in family law more generally, decision makers hearing ‘departure applications’ – applications to depart from formula based assessment of child support - have considerable discretion. However, to succeed in an application under s 117 of the Child Support (Assessment) Act 1989 (Cth) (CSAA), a party must first show they have a ‘special circumstance’,¹ which falls within one of the ‘grounds’ set out in s 117(2).² Once any ground is established, then the decision maker must decide whether it would be just and equitable to the parents and any eligible children to change the assessment, and if so how,³ and also consider whether any such change would be proper from the community’s perspective.⁴

The most common ground relied upon in departure applications made to the Department of Human Services Child Support (CS)⁵ is that relating to the

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1 CSAA s 117(1)(a).

2 This section is broken into 10 grounds (or ‘reasons’) in CS documentation.

3 CSAA s 117(1)(b)(ii)(A).

4 CSAA s 117(1)(b)(ii)(B). This provision ensures that taxpayer considerations are taken into account, by considering the effect of any decision on the parties’ receipt of income tested government benefits.

5 Formerly known as the Child Support Agency, Child Support is presently a section of the

financial circumstances of the parents;⁶ namely, that the assessment 'would result in an unjust and inequitable' rate of child support to be paid, because of the income, earning capacity, property and financial resources of either parent (ss 117(2)(c)(ia) and (ib) – (ib) deals with earning capacity while (ia) covers the other matters⁷). Relatively few child support cases reach court⁸ and so there is not a great deal of recent superior jurisprudence on the application of s 117.

This paper discusses a question which has been answered differently by different decision makers, namely, whether the mere fact that a paying parent has a very high income or considerable wealth amounts to a 'special circumstance' under s 117, when that parent is already paying the maximum assessed rate of child support. The reason this particular issue is problematic is that child support assessments are calculated based on parental income, and the administrative formula for calculating child support has a built in 'cap' on the costs of children tied to parental income. This means there is an effective cap on the level of child support arising from the normal application of the formula. Thus, a legislative decision has been made that, absent any of the special factors set out in s 117(2), child support is not intended to increase ad infinitum merely because parental income exceeds the cap combined income, or the parent has significant assets. However, s 117(2)(c)(ia) provides no indication of the circumstances in which 'the income, property and financial resources of either parent' will amount to a 'special circumstance'.

There have been conflicting, and confused, decisions in relation to this point. However, these cases also highlight some of the interpretive difficulties arising more generally in the application of s 117. This paper explores decision making on s 117(2)(c)(ia) and concludes that where the maximum rate of child support is already being paid, a special circumstance in relation to income or assets requires more than showing that a party has a very high income or considerable assets. The paper also argues that these cases highlight persistent errors by some judicial officers more broadly in the interpretation of 'special circumstances' under s 117.

At first blush this may seem overly generous to very wealthy parents, who could easily afford to make a greater contribution in child support. Even if this is the case, the correct approach must be determined by the proper interpretation of the legislation. Further, this paper presents a range of reasons why permitting departure on this basis is inappropriate within the context of the legislation as presently drafted, not the least of which is the difficulty of

Federal Department of Human Services. Applications must be made to the department in the first instance; the initial decision made by the department can be the subject of an internal merits review (called an 'objection'), then a further merits review by the Social Security Appeals Tribunal can be sought, and thereafter an appeal on a matter of law can be taken to court.

6 Child Support Agency, *Facts and Figures 08–09*, 2009, <<http://www.humanservices.gov.au/corporate/statistical-information-and-data/child-support/>> (accessed 23 April 2015) p 20.

7 Until recently these two subsections were put together in one 'Reason' for departure (Reason 8) in CS's application for departure form, and so the statistics referred to in n 6 do not distinguish between applications in relation to the two subsections.

8 Leaving aside financial disincentives to making a court application, as is outlined below, the court can only hear an application where an issue of law is raised.

answering the question of how one decides when a parent is rich enough to be 'special'. That is not to say that there may not be arguments in favour of a different legislative approach to departures involving the very wealthy; however, that is another debate.

Further, it is acknowledged that it is not possible in this one paper to address in depth the myriad of questions that arise out of the application of s 117 and which are directly or indirectly raised here. Departure applications comprise an area of law that affects substantial numbers of parents, and yet there is very little in the way of useful guidance on the application and interrelationship of the various grounds for departure; certainly this is a topic that would benefit from greater judicial and academic consideration.

The legislative backdrop — the structure and operation of s 117

Section 117 authorises the making of an order for child support (and thus a departure from formula based child support assessment) where:

In the 'special circumstances of the case' (s 117(1)(a)) the court is satisfied:

- One or more grounds for departure under s 117(2) exist, and
- That making the order would be:
 - Just and equitable as regards the payer, payee and children (s 117(1)(b)(ii)(A)), and
 - Otherwise proper (s 117(1)(b)(ii)(B)).

Section 117(4) sets out eight mandatory considerations,⁹ in determining whether it is just and equitable to depart from an assessment.¹⁰ Section 117(5) sets out the considerations relevant to whether a departure would be 'otherwise proper', and is designed to require that the impact of any departure order on a carer parent's entitlement to income tested government benefits be considered, in light of the primary nature of the parental duty of support.

In the Full Court decision of *Gyselman*¹¹ it was held that the application of s 117 mandates a 'three step process'¹² — establishing a 'ground' of departure, considering whether a change is just and equitable as between payer, payee and child/ren and then determining whether that change would be 'otherwise proper'. Importantly (as this seems to have been overlooked in some cases as discussed later), the Full Court said that the approach adopted under the Family Law Act 1975 (Cth) (FLA) provisions on child maintenance¹³ reflects

9 These cover the nature of the parental duty to maintain a child, the child's proper needs, the financial circumstances of the parents and child, the parents' commitments to support themselves and their legal dependants, the costs of providing child care and the question of hardship.

10 One of those considerations is the 'proper needs of the child': s 117(4)(b); CSAA s 117(6) provides further mandatory considerations relating specifically to the proper needs of the child.

11 (1992) FLC 92-279; 15 Fam LR 219.

12 Ibid, at [34].

13 Child maintenance under the FLA is however rarely applicable now and even when both systems were operating together, there was authority to the effect that decision-makers ought to be influenced by child support formula rates in reaching decisions under the child maintenance provisions: *Beck v Sliwka* (1992) 15 Fam LR 520; 107 FLR 289; FLC 92-296.

the second and third stages of the departure enquiry:¹⁴

This suggests that, *once the ground of departure has been established*, the court, in the second and third steps, proceeds in a way which is generally consistent with the Family Law Act provisions. That, however, is subject to the particular wording in s 117(4)–(9), the general scheme and purpose of the Act and the provisions of s 115 that any departure order is intended to have 'the effect that the provisions of this Act relating to the administrative assessment of child support will be departed from in relation to a child in the special circumstances of the case.'¹⁵

Subsections 117(4)–(8) are found under the heading 'Matters to be considered for the purposes of subparagraph (1)(b)(ii)' — that is, the second and third steps in the process. As the second step — the just and equitable enquiry — is much like the process carried out when considering child maintenance under the FLA, subs (4) includes considerations similar to the corresponding FLA provisions. Notably, subs 117(9) states that '[s]ubsections (4) to (8) (inclusive) do not limit other matters to which the court may have regard'. This confirms the broad nature of the enquiry *at this second and third stage*. Notably, subs 117(9) is explicit that it does not apply to the enquiry under s 117(2), namely, whether a ground for departure has been made out.

Subsection 117(2) states that the grounds for departure 'are' those set out in that section. This indicates that the grounds *must* be found from within the subsections of s 117(2). Section 117(2) was interpreted by the Full Court in *Gyselman* thus; the 'approach to the interpretation and application of the *particular grounds* . . . must be guided by [the] qualification . . . that . . . the facts of the case . . . establish something which is special or out of the ordinary . . . "facts peculiar to the particular case which set it apart from other cases"'.¹⁶ So, subss 117(1) and (2) are to be read together to require that a ground for departure can only be made out when special circumstances exist *and* those special circumstances must relate to the specified grounds in s 117(2). Departure applications therefore include a threshold question that must be addressed first,¹⁷ namely, do the facts of this case give rise to a 'special circumstance', falling within one of the grounds set out in s 117(2), which sets it apart from the ordinary case? In *Gyselman* itself, the wife appealed a significant reduction to a child support assessment, where the trial Judge had relied on two grounds for departure in combination (high costs of contact and necessary commitments for self-support) and concluded a ground had been established because the father did not have enough money to reasonably support himself once child support was paid. In allowing the appeal, the Full Court found the trial Judge did not sufficiently analyse the particular facts and circumstances of the case as they related to s 117, including in relation to whether a ground for departure was established. It was not sufficient for the

14 Note that s 117(9) has the effect that s 117(4) and (5) are not exhaustive considerations.

15 (1992) 15 Fam LR 219; FLC 92-279 at [37] (emphasis added).

16 *Ibid*, at [39] (emphasis added).

17 See the Full Court in *Gyselman* where they note that 'once the ground of departure has been established, the Court, in the second and third steps, proceeds in a way which is generally consistent with the Family Law Act provisions': (1992) FLC 92-279; 15 Fam LR 219 at [37]. See also the comments at [106] which confirm that subss 117(4) and (5) are not considered until a ground is established.

father simply to show he could not afford to pay the assessed rate of child support — there had to be a special circumstance falling within the grounds set out in s 117(2) which led to the shortfall in resources.

The operation of the formula ‘cap’

The current iteration of the child support formula was introduced in 2008. There has been, since the inception of the Child Support Scheme, a ‘cap’ on the amount of liable parent income used in calculating child support.¹⁸ Imposing this limit on income had the effect of capping the rate of child support payable under the formula. It has long been recognised that this cap does not limit the amount that can be ordered to be paid pursuant to s 117.¹⁹ For example, the maximum rate of child support due on parental income might be increased in recognition of high private school fees. Once a ground for departure is established, as noted above, the second stage of the enquiry — considering what order is just and equitable as between parents and children — looks more like the process under the FLA for considering child maintenance, and so there is no limit on the amount of child support that can be ordered. The assessment of child support is not, at that stage, limited by how the formula assessment might operate.²⁰

On 1 July 2008 the child support formula underwent radical changes,²¹ however the notion of a cap on the rate of formula assessed child support was retained (with little question),²² if in a different form. Under the current formula,²³ child support is calculated by reference to a notional cost for the relevant child/ren, which is calculated by reference to combined parental income and the age of the children.²⁴ The cap on the child support rate is now achieved by putting a cap on the maximum cost of a child, determined by reference to the child’s age and a maximum relevant combined parental

18 See s 42 of the CSAA when introduced. The way the cap income was calculated changed in 2001 resulting in a lower cap; instead of basing the cap on a multiple of average weekly earnings of *full-time* employees, the figure for *all* employees was adopted, better aligning the treatment of payer and payee parents. In 2005, just before the legislation was amended to introduce the new formula, the cap income was \$130,767: Commonwealth of Australia, *In the Best Interests of Children — Reforming the Child Support Scheme: Report of the Ministerial Taskforce on Child Support*, May 2005, <<https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/in-the-best-interests-of-children-reforming-the-child-support-scheme-report-of-the-ministerial-taskforce-on-child-support>> (accessed 24 April 2015), p 62.

19 *Best and Best* [1993] FLC 92-418; (1993) 16 Fam LR 937; 116 FLR 343 at [143].

20 Though as was noted in *Beck v Sliwka* [1992] FLC 92-296; (1992) 15 Fam LR 520; 107 FLR 289 it may be appropriate for the decision-maker to consider the operation of the formula in reaching a final decision (for example, where the key issue in dispute was one of the parents’ incomes). For a modern reference to this case, see *Styles & Palmer* [2014] FamCA 383; BC201451467 at [360]–[361].

21 Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act 2006.

22 Commonwealth of Australia, *In the Best Interests of Children: Report*, above n 18, at [9.5.5].

23 For a detailed explanation, see L Young, G Monahan, A Sifris and R Carroll, *Family Law in Australia*, 8th ed, LexisNexis, Sydney, 2013, at [11.70]ff.

24 This notional cost is then shared between the parties according to their share of combined income, taking account of the costs they already incur through their physical care of their child/ren.

income.²⁵ Thus, under the formula the cost of the child of a particular age *cannot* increase above the amount calculated by reference to the cap (combined parental) income. This figure is \$177,073 for 2015;²⁶ the actual combined parental income will in fact be somewhat higher, as a self-support amount (presently \$23,610)²⁷ is deducted from each parent's income before this calculation of combined income is made. When combined parental income reaches the cap, an individual parent's liability to pay can increase as their *share* of combined parental income increases. However, as there always remains a cap on total costs of the child/ren, once a parent is liable to pay 100% of the maximum possible costs of the child/ren, they will hit the 'cap' liability, and so increases in their income will not further increase their child support liability. In sum, there is (as there has always been, though calculated differently) a maximum potential liability for child support built into the formula. In this regard, it is notable that the Taskforce responsible for the current formula referred to the ability to exceed the maximum rate assessable under the formula through the s 117, saying '[t]he most likely situation for this would be to deal with very high private school fees'.²⁸

Departure cases involving very high incomes/wealth

The question that has arisen in a number of cases is whether the mere fact of extremely high parental income, or mega-wealth, amounts to a ground for departure under s 117(2)(c)(ia). Before turning to look at this in more detail, it must be noted that (while on the whole the child support population is not wealthy)²⁹ there may well be cases where a parent is not paying the maximum possible rate of child support, but has an extremely high income, or substantial assets. For example, this may arise where a parent has a low taxable income but substantial wealth invested in non-income generating assets, or where a parent has a structure in place that effectively diverts a very high income out of their hands for tax purposes. Such cases are properly the province of s 117(2)(c)(ia).³⁰ This paper is concerned, however, with situations where the formula is operating as it should in relation to the parties' incomes and results in the maximum possible assessment of child support by formula but the receiving parent argues that, because of the paying parent's extremely high income or mega-wealth, a special circumstance should be found, thus permitting an assessment of child support above the maximum rate.³¹

The relevant section reads as follows:

25 Commonwealth of Australia, *In the Best Interests of Children — Reforming the Child Support Scheme: Summary Report and Recommendations of the Ministerial Taskforce on Child Support*, May 2005, p 7.

26 <<http://www.humanservices.gov.au/customer/enablers/child-support/child-support-assessment/working-out-child-support-using-the-basic-formula>> (accessed 24 March 2015).

27 This can be determined by utilising the child support estimator found on the department's website: <<http://www.humanservices.gov.au/customer/themes/child-support-and-separated-parents>> (accessed 23 April 2015).

28 Commonwealth of Australia, above n 18, at [5.4].

29 Child Support Agency, above n 6, at [3.6].

30 CSAA s 117(2)(c)(ib) may also apply, due to the capacity to earn income from an asset.

31 Technically the same argument could be made in relation to a receiving parent's financial situation, and the same arguments would apply.

s 117(2) [T]he grounds for departure are . . . :

(c) that, in the special circumstances of the case, application in relation to the child of the provisions of this Act relating to administrative assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child:

...

(ia) because of the income, property and financial resources of either parent.

There is overlap between some of the subsections of s 117(2) and so the same facts may be considered under different subsections, in different ways. Indeed, this was clear in the first case discussed below, *Stirling v Dobson*.³² While it is beyond the scope of this article to consider the other grounds for departure in detail, suffice it to say, the above subsection is relied on in cases of high income/wealth as it is patently the most likely to apply; also this subsection may well be argued in cases where there is no question of any of the scenarios raised by the other subsections applying.³³ There is no doubt, however, that a lack of jurisprudence in this area contributes to considerable uncertainty as to the precise application of the various grounds for departure.

In the 2011 case of *Stirling v Dobson*, the decision on high income/mega wealth was obiter, given it was uncontested that there was another ground for departure open on the basis of agreed private school fees.³⁴ Once that other ground was established, the second 'just and equitable' stage of enquiry clearly permitted the ultimate decision. However, Ms Stirling argued, amongst other things, that Mr Dobson's considerable wealth and capacity to pay support amounted to a special circumstance. She claimed that actual expenditure on the children was (and had been during cohabitation) greater than was allowed for by the formula, that this was due to the wealth of, inter alia, Mr Dobson and that Mr Dobson could afford to continue to pay child support far in excess of the formula amount. Mr Dobson offered to pay child support at the maximum assessed rate (\$708/week for the three children), plus schooling and other nominated costs.

Federal Magistrate Walters was conscious of the 'cap', as he began by stating that Mr Dobson's income was well over the 'cap' of just under \$150,000.³⁵ It was agreed that Mr Dobson could afford, but did not consent to pay, the rate sought by Ms Stirling. As to the parties' comparative financial

32 (2011) FLC 98-056; [2011] FMCAfam 52; BC201100158, where there was some discussion of whether the fact that the children had been supported to a very high standard prior to separation evidenced a joint intention to 'care for' the children in a particular way within the terms of s 117(2)(b)(ii). This subsection, which also refers to agreements as to the education of children, is most commonly used to justify departures based on private school tuition fees. However, this subsection would not invariably apply to all cases of very high incomes/mega wealth. The precise application of this subsection is also, however, deserving of some more detailed attention.

33 For example, the parents of the child may have had no prior relationship or financial interconnection but the payer may be an extremely high earner. This scenario would be unlikely to enliven any subsection other than s 117(2)(c)(ia).

34 Which would give rise to a special circumstance under s 117(2)(b)(ii).

35 (2011) FLC 98-056; [2011] FMCAfam 52; BC201100158 at [85]. Presumably his Honour was referring to the combined parental income cap, as there was no individual income cap at this time.

situations, Ms Stirling had no income, but assets in the form of a home worth \$5 million in Australia and a half share in a home worth around \$19 million in the United Kingdom. Mr Dobson's assets, though hard to value precisely, were in the order of \$30 million and he had an income of just under \$9 million a year. Ms Stirling had subsequently (re)married. Her husband was not working but had assets and financial resources in the order of \$100 million. Walters FM found that to the extent that Mr Dobson did not meet the children's expenses, Mr Stirling would pick up the difference rather than require Ms Stirling to liquidate her Australian property to support the children.

In relation to the definition of 'special circumstances' generally, his Honour said:

'special circumstances' are little more than facts peculiar to a particular case which distinguish it from other cases, *or* make it special or out of the ordinary. Alternatively, facts might amount to 'special circumstances' if a failure to take them into account would result in injustice or undue hardship (to Ms Stirling, or possibly to the Dobson children).³⁶

However, as held in *Gyselman*, the special facts must do more than distinguish a case from others — they must mark it out as special or out of the ordinary.³⁷ Further, his Honour's inclusion of a 'hardship/injustice' basis for establishing a special circumstance warrants attention. These words do not appear either in s 117(2) or in the Full Court's interpretation of the words 'special circumstances' in *Gyselman*. It is possible this 'alternative' formulation is based on a statement made by Ellis J (with whom Nygh and Mullane JJ agreed) in a child maintenance case under the FLA, *Sheahan v Sheahan*.³⁸

It seems a mistaken interpretation of s 117(2), based on *Sheahan*, has found its way into first instance child support decision-making. In the earlier child support case of *W & W*,³⁹ Riethmuller FM relied on *Sheahan*, without explanation, in the same way as Walters FM later did. However, *Sheahan* considered child maintenance under the FLA and in particular what amounted to a special circumstance under what is now s 66K(1)(e) of the FLA (then s 66E(1)(d)). That section provides a list of factors relevant to determining the contributions parties ought to make to the support of the relevant children and includes 'any special circumstance which, if not taken into account in the particular case, would result in injustice or undue hardship to any person'. This FLA section is very different to s 117(2), which sets out the grounds for departure; moreover, s 117(4)(g) specifically requires the court to look at hardship in the application of the second stage of the enquiry. That is, under s 117 hardship is a factor in the second 'just and equitable' stage, in deciding what order, if any, to make — *not* in deciding whether a special circumstance is established.

It may be *Sheahan* was mistakenly relied upon because, in *Sheahan*, the Full Court noted they were referred by counsel to the case of *Savery* — a child support case dealing with special circumstances under s 117(2). It is

36 Ibid, at [95] (emphasis added).

37 Ibid, at [39].

38 (1993) FLC 92-375; 16 Fam LR 437; 113 FLR 429 at [12].

39 (2005) 34 Fam LR 115; [2005] FMCAfam 295 at [5].

instructive to consider the relevant passage of Ellis J's judgment in *Sheahan*:

There is, understandably, no definition of the phrase 'special circumstances' contained in the Act and, in my view, no purpose would be served by attempting to define it. We have, however, been referred to the decision of *Savery and Savery* [1990] FamCA 30; (1990) FLC 92-131 where 'special circumstances' were held to be 'facts peculiar to the particular case which set it apart from other cases'. The relevant facts of the particular case must be considered to determine whether they constitute special circumstances which, *in this context*, if not taken into account, would result in injustice or undue hardship to any person.⁴⁰

Ellis J is therefore only referring to *Savery* in relation to the general meaning of the words 'special circumstance'. As his Honour makes clear, *in the context of the FLA* those peculiar facts must 'result in injustice or undue hardship' to someone — because that is what the FLA section requires. Section 117(2) of the CSAA says no such thing. Thus, *Sheahan* provides no authority for importing a test of injustice/hardship into the threshold question of 'special circumstances' under s 117(2). However, it seems this mistaken interpretation has gained a considerable foothold in first instance decision-making.⁴¹ Notably, there appear to be no Full Court decisions that refer to *Sheahan* in the same way.

As to the ground for departure in *Stirling v Dobson*, Walters FM noted that Ms Stirling did not identify the ground being relied upon in relation to her claim based on Mr Dobson's wealth, which no doubt made the task more difficult for his Honour. As to whether Ms Stirling's case had substance, his Honour said:

the question arises whether 'special circumstances' might be considered to exist if Ms Stirling is successful in demonstrating (for example) that the actual cost — to her — of maintaining the children is indeed something in excess of \$1500 or \$2000 per week. If Mr Dobson is 'only' contributing some \$700 per week to \$800 per week towards the maintenance of the children, and if Mr Dobson is in a much stronger financial position than Ms Stirling, then might these facts be regarded as sufficient 'special circumstances' to support the departure application? *In my opinion, they might. The overall financial circumstances of the parties, and the extremely comfortable lifestyle enjoyed by the children, clearly set this case apart from other cases. Where the actual expenses that Ms Stirling incurs in maintaining the children are far in excess of whatever allowance the child support scheme makes for the costs of children, and where Mr Dobson has conceded that — if ordered to do so — he could meet those expenses, it is not difficult to conclude that 'special circumstances'*

40 (1993) FLC 92-375; 16 Fam LR 437; 113 FLR 429 at [12] (emphasis added).

41 For examples of other cases that rely on *Sheahan* in this way, see *MNR & MEA* [2004] FMCAfam 619; BC200409215 at [124]; *O' Loughlin & O' Loughlin (No 2)* [2007] FamCA 1546; BC200750780 at [195]; *Hartnett & Sampson (No 2)* [2007] FamCA 241 at [121]; *Robbins & Rosemount* [2008] FamCA 486; BC200851297 at [894]; *Spencer & Marks (No 2)* [2011] FamCA 932 at [71]; *Parkin & Sykes* [2011] FMCAfam 842; BC201106239 at [103]; *Delacroix & Delacroix* [2013] FamCA 1056 at [38]; *Wellesley & Weldon* [2013] FMCAfam 283; BC201309331 at [98] and *Killam & Levitt* [2015] FamCA 52 at [74]. Though note the comments of Wilson FM in *Gabbard & Gabbard* [2006] FMCAfam 477; BC200611574 at [41]–[43] which seem to challenge, at least partially, this interpretation of *Sheahan*.

exist. Further, it is not difficult to conclude that failure to properly consider the departure application on its merits could result in an injustice to Ms Stirling (if not to the Dobson children).⁴²

. . . I find that, in the special circumstances of the case now before me, adherence to the provisions of the child support formula would result in an unjust and inequitable determination of the level of financial support . . . because of the overall respective financial positions of the parties (including Mr Stirling's financial position).⁴³

The wording of the last paragraph extracted above indicates that his Honour concluded a ground for departure existed under s 117(2)(c)(ia).⁴⁴ His Honour went on to find it just and equitable that Mr Dobson pay 77.5%⁴⁵ of the children's total costs,⁴⁶ a figure about mid-way between the competing proposals. The payment included a 'base' rate of support (ie, not covering school expenses) above the maximum amount payable under the formula.

Thus, in reaching his decision, it seems Walters FM concluded that extreme wealth — including very high parental incomes — is sufficient to establish a special circumstance.⁴⁷ His Honour is not alone, if indeed this is his view. In the 2011 case of *Spencer & Marks (No 2)*,⁴⁸ Bell J (also relying on the erroneous interpretation of *Sheahan* referred to above) is unequivocal on the point, finding only one ground for departure established, saying of a husband with an income of \$500,000:

It is my belief that the disparate income between the parties is such that the wife would suffer undue hardship should the order not be departed from, and accordingly special circumstances are present from the facts of this case justifying a departure order to minimise the disparity.⁴⁹

In the 2012 case of *Nielson & Nielson*,⁵⁰ while Loughnan J ultimately relied on high schooling costs as the 'special circumstance', his Honour's statements⁵¹ equally indicate a view that the fact the 'husband's income and earning capacity are many times the cap rate' was sufficient to establish a ground for departure.⁵²

42 (2011) FLC 98-056; [2011] FMCAfam 52; BC201100158 at [97] (emphasis added).

43 *Ibid*, at [175].

44 See also his Honour's comment, see *ibid*, at [175].

45 Being half way between what his Honour thought was the appropriate range of 75–80%: *ibid*, at [176].

46 Mr Dobson was ultimately ordered to pay \$516 per week per child. This was an all-inclusive rate that included the various out of pocket expenses Mr Dobson had previously been meeting directly, including school costs.

47 While the claim was in part made in relation to actual expenditure, that alone could not have been sufficient. The very high expenditure was only possible *because* of the mega-wealth of the various parties. Had there been high expenditure on normal living expenses, but no extreme wealth, there is no question, as his Honour's reasoning confirms, that the claim would have failed in this respect. It is not clear what his Honour would have concluded had the paying parent had a very high income, but never previously expended it on the child/ren above what was required under the formula assessment (eg, if the parents had not been a couple previously).

48 [2011] FamCA 932.

49 *Ibid* at [71].

50 [2012] FamCA 70; BC201250165.

51 *Ibid*, at [231].

52 See also the decision of Faulks DCJ in *Bertram-Power & Power* [2013] FamCA 520,

The Full Court in *Best and Best* made the following obiter — and otherwise unexplained — statement, in a decision that confirmed a departure order could exceed the maximum rate of child support derived utilising the cap:

it is clear to us that [the cap] has no relevance in the determination of a departure order under s 117. Indeed, one of the circumstances which may attract the exercise of that power is that the income of the non-custodial parent is (substantially) above that maximum.⁵³

However, not all judges have adopted the same approach. In *Carroll & Maybury*,⁵⁴ McGuire J rejected a wife's application for departure that rested on the husband's high income.⁵⁵ While his Honour's reasoning is somewhat difficult to follow,⁵⁶ it is clear that he did not see the mere fact of a very high income as being sufficient to warrant a change to the assessment.

The matter was considered directly by Strickland J in the 2011 case, *Seymour & Seymour*.⁵⁷ The Federal Magistrate in this case had refused to find a ground for departure established based solely on the husband's high income, relying rather on high education costs, and had then considered the husband's substantial income in determining a just and equitable rate of child support. The Federal Magistrate was explicit that it was the existence of the cap in the formula that led to this conclusion on the application of s 117(2)(c)(ia).⁵⁸ On appeal, Strickland J affirmed the Federal Magistrate's approach, saying (somewhat surprisingly) it was consistent with the previous Full Court authority of *Best and Best*,⁵⁹ though his Honour went on to say *Best* had not directly addressed the question of whether wealth, without more, could provide a ground for departure.⁶⁰

The proper interpretation of s 117(2) and the meaning of 'special circumstance'

There is little doubt that the terms of s 117(2)(c)(ia) are open to multiple possible interpretations. A first port of call for interpreting this section would therefore require consideration of this subsection in the context of the CSAA. That is, the fact of the cap needs to be directly addressed when determining

particularly the brief discussion at [8]–[9]. His Honour concluded that the husband's substantial income of around \$480,000 warranted a departure from the formula assessment, simply because it was greater by \$33,754 than the amount showing in the tax return being used in the assessment. Notably, as in *Stirling*, his Honour also indicates that s 117(2)(b)(ii) — the way the children are being 'cared for' — applies because 'these are privileged children' who have been liberally supported by their parents: *ibid*, at [8].

53 [1993] FLC 92-418; (1993) 16 Fam LR 937; 116 FLR 343 at [143]. It appears in this case that there was a clear ground available under Reason 8 as the father was earning much more than the old income figure being used in the assessment which was below the cap.

54 [2013] FCCA 288; BC201309994 at [88]–[90].

55 At least \$600,000 per year, which income was able to be distributed to both the husband and his new wife via a trust.

56 For example, referring to the formula building in 'the needs' of the children, which produces a 'cap' on the rate; it is not clear if his Honour was talking about actual or notional needs.

57 [2011] FamCAFC 97; BC201150261.

58 *Ibid*, at [117].

59 (1993) 16 Fam LR 937; (1993) FLC 92-418.

60 *Ibid*, at [122]. While it was not central to the case, note the Full Court's obiter comment on this matter set out in the text accompanying n 49 above.

what is meant by a special circumstance in this context. Further, while it is trite to say that the purposive approach to interpreting the subsection must be adopted, little assistance is gained by considering the objects of the child support legislation.⁶¹ The principal object (s 4) speaks of ensuring children receive a 'proper' level of support, with the more particular objects including that the level of support is determined according to 'the costs of the children' and that parents meet that cost according to their relative capacities. Further, children should 'share in changes in the standard of living of both parents' regardless of where they live. These sections are so generally worded they could be read to support either interpretation.

However, the reason for having a 'cap' on child support rates is because the architects of the legislation considered the research supported the conclusion that, as income increases, the overall proportion of income spent on raising children decreases.⁶² Thus, the Taskforce responsible for the current iteration of the formula concluded 'it was reasonable to impose a ceiling on the maximum level of child costs that *any* parent could be expected to meet'.⁶³ As the Federal Magistrate accepted in *Seymour*, '[t]hey are capped because once a payment gets to an appropriate amount; the child can live a reasonable lifestyle . . .'.⁶⁴ The Taskforce noted that as household income increases, spending becomes discretionary. Further, they recited data indicating support by parents for the idea of the cap. The Taskforce concluded a cap should continue to apply concluding:

It follows that there must be mandatory limits on the level of transfers made, based on a generic formula. A parent may choose to pay more. It should also remain possible to exceed the cap through the change of assessment process. The . . . Registrar already has a discretion to assess mandatory child support contributions in excess of the cap. At present, two reasons for a change of assessment are that:

- It costs extra to cover the children's special needs
- It costs extra to care for, educate or train the children in the way that the parents intended

Only a small number of cases are likely to arise on this ground involving raising the cap.⁶⁵

There seems little question the taskforce did not countenance the idea that s 117(2)(c)(ia) could be invoked simply because a parent had a very high income.

Federal Magistrate Walters' conclusion in *Stirling* has an intuitive attraction; clearly this family was financially out of the ordinary. However, is that sufficient to give rise to the 'special circumstance' required by s 117(2)(c)(ia)? Many 'normal' parents could prove they routinely spend more on the general support of their children than is allowed for under the formula (and did so before separation) and/or that due to an income exceeding the cap the payer parent could afford to pay more than the rate of child support assessed on their income. But on a proper reading of the section, and as a

61 CSAA s 5.

62 Commonwealth of Australia, above n 18, at [6.1], [8.10] and [9.5.5].

63 Ibid, at [8.10] (emphasis added).

64 [2011] FamCAFC 97; BC201150261 at [40].

65 Commonwealth of Australia, above n 18, at [9.5.5].

careful reading of *Gyselman* makes abundantly clear, the reason for spending more than the formula assessed amount on the children, or for the paying parent having excess capacity to pay more than the assessed rate, *must* be a special circumstance not already factored into the formula assessment,⁶⁶ that falls within one of the specified grounds under s 117(2). This is because the whole premise of the child support formula — as opposed to judicially determined child support — is that a *notional* figure is used, with only very limited scope for departure. To say that the notional figure should not be used because the parents actually spend (or spent) more or the paying parent can afford to pay more because of a high income or wealth is hardly a novel or special argument, or circumstance. This could be the case were the parents' incomes to be only a little over the combined cap income, or indeed less than that cap income.

Of course, once another reason is established, the decision-maker must consider the factors listed in s 117(4) and look at the overall relative financial circumstances of the parties to arrive at a finding that is fair as between the parties and the child. At that stage of the inquiry, as indicated above, the case law is clear that the cap income figure and maximum child support rate become irrelevant. However, that is a very different thing from finding that the *mere* fact of an extremely high income or higher than average level of wealth establishes s 117(2)(c)(ia).

In addition to the specific issue raised concerning the use of *Sheahan* above, this enquiry raises another difficult question more generally about the application of s 117; what facts can properly amount to a 'special circumstance'? The discussion of this issue by Wilson FM in *Gabbard & Gabbard*,⁶⁷ highlights the difficulty of answering this question. His Honour says '[l]ittle useful guidance is found in the decided cases',⁶⁸ that the statements in *Gyselman* and *Savery* do not provide any useful guidance⁶⁹ and that ss 117(1) and (2) in so far as they refer to special circumstances are clumsily drafted.⁷⁰ This uncertainty has been compounded by some judges misinterpreting the relationship between s 117(2)(c)(ia) — which requires that the special circumstance relating to income etc, must result in an 'unjust and inequitable' level of child support payable by the liable parent — and s 117(4) — which lists the relevant considerations when determining, as between the payer, payee and children, what order, if any, would be 'just and equitable'.

A plain reading of s 117 leads to the conclusion, as endorsed by the Full Court in *Gyselman*, that the factors in s 117(4) (the 'just and equitable' enquiry) are *only* to be considered after it is decided that a threshold special circumstance exists. As the Full Court has also noted, some of the factors in s 117(4) overlap with those in s 117(2) and thus a decision-maker may not need to go slavishly through all of the s 117(4) factors at the second stage,⁷¹

66 See, eg, the discussion (2011) FLC 98-056; [2011] FMCAfam 52; BC201100158 at [39] and [57].

67 [2006] FMCAfam 477; BC200611574 at [41]–[43].

68 *Ibid*, at [36].

69 *Ibid*, at [38].

70 *Ibid*, at [40]. Notably the Full Court in *Gyselman* referred to 'the careful way in which s 117 has been structured': [1991] FamCA 93 at [35].

71 See *Hides v Hatton* [1997] FamCA 28; (1997) FLC 92-759. See also the Full Court

because to some extent they may already have been considered under s 117(2). The Full Court has not said, however, that the s 117(4) factors are relevant to determining the threshold question of whether there is a special circumstance — rather, it is the reverse, that some of the factors giving rise to a special circumstance may also go to what order is just and equitable.⁷² This approach makes sense — there is no need to consider the outcome in determining whether or not a case is special; however, it may well be that, despite the facts giving rise to a special circumstance under s 117(2), once the further factors in s 117(4) are considered it is decided that it is not just and equitable as between the parents and child to make a change to the assessment.⁷³

There are further statements in *Gyselman* that confirm the very distinct and separate operation of the first and second (and indeed third) stages of the departure enquiry. The Full Court said that the financial position of the wife in that case 'would become relevant *if a ground was established and it was therefore necessary* to turn to subss (4) and (5)'.⁷⁴ In considering how s 117(4) operates, their Honours said 'some of the matters listed in subsection (4) may overlap with matters *already considered* under subsection (2)'⁷⁵ and later they added:

It is likely that aspects of this will have already been considered, at least in relation to the non-custodian, under subsection (2). *However, the paragraphs are important because at this stage* the legislature is drawing attention to the balancing process between the claims of the non-custodian for a reduction based on his or her financial circumstances and those of the custodian.⁷⁶

Each of the 'special circumstances' set out under s 117(2) must result in a need for a change to be considered; that reason for considering a change varies depending on the category of special circumstance under s 117(2). Sub-sections (2)(a) and (aa) require that the special circumstance has the consequence of significantly reducing the capacity of a parent to provide financial support for the child, whereas the special circumstance under sub-section (2)(b) must significantly affect the costs of maintaining the child. As we have seen, sub-section (2)(c) requires that the special circumstances relating to the parties' financial circumstances must result in an 'unjust or

discussion of this process in *Babbitt & Babbitt* (2011) 252 FLR 1; 46 Fam LR 77; [2011] FamCAFC 151; BC201150414 at [153]–[160].

72 Note the contrary position taken by Reithmuller FM in *W & W* (2005) 34 Fam LR 115; [2005] FMCAfam 295 at [7] and [19]. This is discussed later in the article.

73 See further the statements at [106], [125] and [139], which confirm the very distinct and separation operation of the first and second (and indeed third) stages of the departure enquiry. Indeed, the interrelationship between subss 117(2) and (4) is arguably similar to that between FLA subss 79(2) and (4) as interpreted in *Stanford v Stanford* (2012) 247 CLR 108; 293 ALR 70; 47 Fam LR 481; [2012] HCA 52 and *Bevan & Bevan* (2013) 279 FLR 1; 49 Fam LR 387; [2013] FamCAFC 116; BC201350384. The Full Court was clear that in relation to those sections the two steps are distinct and must not be conflated and the determination of what order to make will necessarily involve detailed consideration of matters that were not germane to the question of whether or not an order should be made at all.

74 (1991) 15 Fam LR 219; 103 FLR 156; [1992] FLC 92-279 at 79,075-79,076 (emphasis added).

75 *Ibid*, at 79,078 (emphasis added).

76 *Ibid*, at 79,079 (emphasis added).

inequitable' level of child support. Thus, it may be that a special circumstance under s 117(2)(c) does *not* result in an 'unjust and inequitable' level of child support being paid overall according to the formula;⁷⁷ if it does not, then the enquiry does not proceed to the more expansive consideration required under s 117(4) when determining what change, if any, is appropriate. The point is, the process required under s 117 does not invite the decision maker to *start* by considering the individual circumstances of the case under s 117(4) and decide whether they think something other than the formula rate would be fair; rather it requires *first* a threshold finding that a special circumstance as enumerated in s 117(2) results in some unfairness. Indeed, if s 117(4) could be considered at the outset, the grounds in s 117(2) would be redundant. Thus, a special circumstance does not arise because, in the normal (ie not special) circumstances of a case, a decision maker thinks the assessment is unfair by reference to the matters set out in s 117(4).

However, there has been judicial confusion as to this relationship between subss 117(2) and (4), perhaps arising out of the ambiguity of the meaning of 'special circumstances'. The view was expressed in *W & W*⁷⁸ that 'special circumstances' is an 'open ended . . . concept'.⁷⁹ However, the two cases⁸⁰ used by the judicial officer to justify this interpretation are questionable authorities for this proposition. These two decisions by the same judge provide nothing in their reasoning to support an interpretation of 'special circumstances' as 'open ended'; indeed, given their peculiar facts and the issue addressed in each, they do not provide any illuminative legal precedent as to the meaning or application of the term 'special circumstances'.

The Federal Magistrate in *W & W* set out the relevant passages of *Gyselman* as to the meaning of 'special circumstances', then referred to *Sheahan*.⁸¹ As discussed above, this is a child maintenance case and arguably not relevant to the interpretation of s 117(2). Further, the following interpretation of 'special circumstances' by the Federal Magistrate in *W & W* conflates subss 117(2) and (4):

The statement of the ground, as it actually appears in s 117(2)(c)(i) [now s 117(2)(c)(ia)], must be read bearing in mind that the words 'unjust and inequitable' have themselves a lengthy definition provided for in s 117(4) through to s 117(9).⁸²

Reinforcing this erroneous interpretation of the operation of these sections, the Federal Magistrate then criticised the objections officer in *W & W* for not taking into account the matters set out in s 117(4) when considering whether a ground for departure was established under s 117(2).⁸³ Having concluded the objection decision was flawed, his Honour then reconsidered the matter. In doing so, his Honour discussed how the formula as applied in this case

⁷⁷ An example might be where the assessed child support looks unjust and inequitable based on a parent's income when one small point in time is considered, however, when looked at over a longer period, it does not look unjust.

⁷⁸ (2005) 34 Fam LR 115; [2005] FMCAfam 295.

⁷⁹ *W & W* (2005) 34 Fam LR 115; [2005] FMCAfam 295 at [8].

⁸⁰ *Portillo & Portillo* (1994) FLC 92-484; 17 Fam LR 777; 117 FLR 210 and *S v C* (1997) FLC 92-750.

⁸¹ (1993) FLC 92-375; 16 Fam LR 437; 113 FLR 429.

⁸² (2005) 34 Fam LR 115; [2005] FMCAfam 295 at [14].

⁸³ *Ibid*, at [21].

resulted in unfairness, concluding by saying that s 117(2) provides the solution to this. The nub of his Honour's decision was that this case was unusual because the payer's wife had a higher than normal capacity to contribute financially to the support of their dependent children and the payer could share expenses with her (something patently not intended to be included in the formula assessment of child support and not covered by any of the grounds for departure under s 117(2)). His Honour said that careful formula analysis alone, while useful, is not sufficient for the purposes of s 117(2), concluding that to determine if a special circumstance exists, one must look to subs 117(4)–(9).⁸⁴ With respect, this approach does not reflect the terms of the section, is not permitted under *Gyselman* and makes redundant s 117(2). His Honour basically says that, even though no matter under s 117(2) had presented itself, and the formula was operating precisely as it was intended to, in his view the formula did not operate fairly in this case, and that this was therefore a 'special circumstance'.

Further, the Federal Magistrate criticised the objections officer's conclusion that 'just because a parent may appear to have additional capacity to pay child support does not mean it should be automatically directed to child support. There must be a reason established for doing so.'⁸⁵ His Honour responded:

There was never any dispute in this case that the child has financial needs far greater than the assessment amount, which were not able to be met by the applicant [mother]. As a matter of fundamental principle, child support (and maintenance) is based upon the needs of the child and the capacity of the parents to meet that need . . . The needs of the child and the ability to meet those needs lie at the heart [sic] of a 'special circumstance under [s 117(2)(c)(ia)] . . . The only real issue in this case was the capacity of the respondent [father] to assist in meeting the child's financial needs.

Whatever ethos might underpin the child support scheme, the clear words of the statute cannot be ignored and s 117(2)(c)(ia) is not framed in the terms suggested by his Honour; it is clearly not a question of the needs of the child. The needs of the child can only be considered in limited circumstances under other parts of s 117(2).

This is not the only case evidencing judicial confusion as to what amounts to a 'special circumstance' and the width of s 117(2). In *Seigel & Danner*,⁸⁶ Warnick J upheld an appeal partly on the basis that the Federal Magistrate had based his conclusion as to the existence of a ground for departure on the fact that one of the parties lived outside of Australia. Warnick J, however, was clear that 'for "the special circumstances" to found a departure from an assessment, they must have a relationship to the ground for departure'.⁸⁷

Confusion as to the proper application of s 117(2), and particularly the relationship between subs 117(2) and (4), is significant in cases of extreme income/wealth, because clearly under subs 117(4) that income/wealth is a very relevant factor. The question remains, however, as to its relevance under subs 117(2)(c)(ia), where the parent is already paying the maximum rate of

⁸⁴ *Ibid*, at [32]–[33].

⁸⁵ *Ibid*.

⁸⁶ [2009] FamCAFC 100; BC200950311.

⁸⁷ *Ibid*, at [46].

support. Child support legislation is not intended to effect redistributions of wealth; the formula assesses capacity to pay support based on income in the first instance and once a parent shows a capacity to pay the maximum level of support based on the prescribed maximum combined income, it is arguably irrelevant (in terms of establishing a ground for departure under s 117(2)) to show they have assets or income that further increase their capacity to pay — as discussed above this is the whole point of the cap. There is also an obvious link between income and assets; high income earners often accumulate considerable assets, and assets in turn have the potential to generate income. Thus, when setting the cap it was arguably envisaged that many high income earners would have significant assets, and this of itself should not be enough to establish a special reason. Once a parent is paying the maximum assessable rate of child support, without some other special circumstance (such as special needs of the child or high education costs) child support should not increase simply because the parent has a very high income and can afford to pay more. It is hard to see how that was not the clear intention of the cap in the formula. Indeed, the Full Court has said that the mere fact that a parent's income has decreased below the amount used in the assessment is not sufficient, per se, to establish this same ground for departure.⁸⁸ The words of subs 117(2)(c)(ia) are deliberately broad to ensure that a wide range of unfair circumstances relating to the parties' financial situations can be captured by this provision (for example, changes in employment, receipt of untaxed income, the interposition of entities to divert income out of the hands of the parent etc) but it is difficult to see how high income or mega wealth alone amounts to an unfair circumstance where the legislature has decided to impose a cap on the maximum assessed rate of child support. Indeed, it was precisely to stop child support increasing based solely on higher incomes that the cap was introduced. Thus, the approach adopted in *Seymour* is to be preferred.

Moreover, a position that permits high income or wealth alone to justify a departure raises some very difficult questions (very similar to those seen in the now rejected 'special contributions' approach used in 'big money' property settlement cases).⁸⁹ Most obviously, at what point is the wealth/income threshold crossed to make the case special? A great many parents have combined incomes over the cap. Precisely how is a decision-maker to determine when this extra income/wealth amounts to a 'special circumstance' given the legislative intent was not to have child support increase simply based on very high payer income or because some people have more assets than others. This approach undermines the essential premise that, absent specified special circumstances, child support is calculated by reference to a statutory formula based on income, and not by reference to the *particular* financial circumstances of an individual family.

Further, and very importantly, allowing a departure based solely on high income/wealth treats rich families differently without a sound basis for doing so. If mega-wealth/high income alone can amount to a special circumstance,

⁸⁸ *Ross v McDermott* [1998] FamCA 134; (1998) FLC 93-003, (1998) 23 Fam LR 613 at [30].

⁸⁹ See *Hoffman v Hoffman* (2014) 51 Fam LR 568; [2014] FamCAFC 92; BC201451244; *Fields & Smith* [2015] FamCAFC 57 and L Young, 'Sissinghurst, Sackville-West and "Special Skill"' (1997) 11(3)*AJFL* 268.

why could a parent not show that their circumstances were special because they could *not* afford the normal rate of child support due to their very *low* income (assuming there was nothing special about their expenses)? As CS policy documents suggest,⁹⁰ this argument is unlikely to be successful notwithstanding this would seem more of a special circumstance than in *Stirling v Dobson*, where the children would suffer no hardship regardless of the outcome. *Stirling v Dobson* is a decision which arguably says the same rules for child support do not apply to extremely wealthy families, *despite* the provision of a cap rate. While the ultra-poor and their children may be bound by the notional costs of children built into the formula, and have to cut their cloth to fit their circumstances, the children of the mega-rich are not necessarily so bound.

One can sympathise with an approach that permits reconsideration of the amount of child support payable by extremely high earners — otherwise many mega-wealthy payers of child support will essentially be free to determine the extent to which they wish to elevate the child's standard of living when not with them (absent any other ground that gets them over the line, such as private school costs as in *Stirling*). But the attractiveness of this approach is not sufficient; it must be permissible under the legislation and arguably, when the legislation is read as a whole in light of its intended operation and the superior case law considered, it is not.

Conclusion

It has been argued here that the approach in *Seymour* is to be preferred, namely, that subs 117(2)(c)(ia) should be interpreted not to permit a ground for departure to be established solely based on a parent's very high income or extreme wealth where the maximum child support rate is already being paid. There is a significant point of law at issue in terms of the interpretation of s 117(2) but the differing judicial approaches to this issue indicate confusion on this point as well as more broadly on the interpretation of 'special circumstances' and particularly the interrelationship between subs 117(2) and (4). Given how few cases go to court, these matters are not likely to be considered by a superior court any time soon. While not binding on decision-makers, it would be useful if, at the very least, the policy document (the Guide) used by CS⁹¹ addressed this question directly, as most decision-making in this area is done internally by CS decision-makers.

Obviously, the same cannot be said if the formula assessed child support is not at the maximum rate. There may well be cases where a parent is assessed to pay something less as a result, for example, of the way their business is structured. Thus, the parent's taxable income may not reflect their true income. But in such a case the ground would not be established because of the extreme

90 <<http://guides.dss.gov.au/child-support-guide/2/6/13>> (accessed 27 March 2015). However, see *EGH & SH* [2005] FMCAfam 27; BC200500563 where a payee established a ground based on the inability to meet her normal expenses on her low income; however, it was also established that the husband's actual income was double his assessable income of about \$25,000.

91 See <<http://www.humanservices.gov.au/corporate/publications-and-resources/child-support-guide/>> (accessed 7 January 2015).

income/wealth but rather because the assessment did not reflect the parent's true income. If there were no other factor relevant, it would be open to a decision maker in those circumstances to decide the correct outcome was to set the parent's income – doing so would allow the cap to operate. Of course, the decision maker would not be obliged to adopt that approach, though it is appropriate for decision makers to consider how the formula assessment would operate in such a case.⁹²

It might be suggested that the issues raised in this paper raise more fundamental questions about the formula. Is a cap appropriate? Should s 117 accommodate more cases where actual expenditure on a child makes the formula assessment unfair (that is, beyond that contemplated by the other grounds for a departure)? It seems extremely unlikely, however, there would be any political will to reconsider these questions, as the only way to address them short of removing the cap – which seems a remote possibility to say the least – would be to permit more departure from the formula and effectively more individualised assessment of child support, which is expensive and a return to the past. In fact, the most recent statements from the federal government on child support are to the effect that the last round of reforms have made the system too complicated.⁹³ While child support reform is again on the Federal Government's agenda,⁹⁴ it seems unlikely issues such as these will be addressed. Thus, we shall have to wait until the Full Court is called on to consider these issues in more detail.

92 See the cases above n 20.

93 See the reported complaints of National Federal Member of Parliament George Christensen, who will chair the Social Affairs and Legal Policy Committee: L Constable, 'Christensen takes key role in social policy, legal affairs', *Daily Mercury*, 11 November 2013, <<http://www.dailymercury.com.au/news/christensen-takes-key-role-social-policy-legal-aff/2080075/>> (accessed 6 January 2015).

94 See <<http://www.aph.gov.au/childsupport>> (accessed 17 March 2015) for details of the Federal Government's most recent enquiry into child support.