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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAMILY LAW AMENDMENT (VALIDATION OF CERTAIN PARENTING
ORDERS AND OTHER MEASURES) BILL 2010**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Robert McClelland MP)

FAMILY LAW AMENDMENT (VALIDATION OF CERTAIN PARENTING ORDERS AND OTHER MEASURES) BILL 2010

Outline

The Family Law Amendment (Validation of Certain Parenting Orders and Other Measures) Bill 2010 (the Bill) creates new statutory rights and liabilities for families who may have been affected by the High Court's decision in *MRR v GR* [2010] HCA 4. This decision casts doubt on the validity of certain parenting orders made or purportedly made on or after 1 July 2006 when shared parenting reforms were introduced. Orders that may be affected are those where the parents have equal shared parental responsibility and the court has not considered certain criteria relating to equal time or, if the case requires, substantial and significant time in accordance with section 65DAA of the *Family Law Act 1975*.

The Bill creates new statutory rights and liabilities and ensures that these are exercisable and enforceable as if they had been made under the Family Law Act. People will be able rely on these rights and liabilities in their day-to-day lives. Appeal rights against all orders affected by the High Court's decision in *MRR v GR* would be preserved. People with contested parenting orders will also be able to commence fresh family law proceedings where the court did not specifically consider the reasonable practicability of the parenting arrangement without having to demonstrate a material change of circumstances. Family Courts are given jurisdiction and powers to deal with new statutory rights and liabilities. Most importantly, the Bill gives much needed certainty to families and their children.

The Bill is based on the approach approved by the High Court in *R v Humby; ex parte Rooney* (1973) 129 CLR 231 and other similar legislation such as the *Family Court of Western Australia (Orders of Registrars) Act 1997*, former Part XIVB of the Family Law Act inserted by Schedule 10 to the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, and the *Judiciary Legislation Amendment Act 2006*.

The Bill also amends the Family Law Act to allow, but not require, a family court to consider each of the statutory criteria in subsections 65DAA(1) and (2) of that Act when considering an application that it make a parenting order with the consent of parties to proceedings where parents have, or are to have, equal shared parental responsibility for the child. This will ensure that the family courts can give appropriate weight to arrangements agreed by parents addressing how they will care for their children.

Financial Impact

The amendments in this Bill have negligible financial implications.

NOTES ON CLAUSES

Clause 1: Short title

The short title for the Bill, once enacted, will be the *Family Law Amendment (Validation of Certain Parenting Orders and Other Measures) Act 2010*.

Clause 2: Commencement

2. This clause provides for the commencement of the Act. Sections 1 to 3 of the Act will commence on the day the Act receives the Royal Assent. Schedules 1 and 2 of the Act will commence on the day after the Act receives the Royal Assent.

Clause 3: Schedules

3. Clause 3 provides that each Act specified in a Schedule to the Bill will be amended or repealed as set out in the Schedules. This clause also provides that each other Item in the Bill is to have effect according to its terms.

SCHEDULE 1 - VALIDATION OF CERTAIN PARENTING ORDERS

Item 1: Interpretation

4. Item 1 defines a number of terms used in Schedule 1, namely, affected order, consider, court, enforceable, enforcement law, liability, Registrar, required matter and right. Of particular note

- **consider** is defined as having the same meaning as in section 65DAA of the Family Law Act. The definition is intended to draw on the reasoning in *MRR v GR* which held that the court must make findings about the matters in section 65DAA of the Family Law Act when making parenting orders;
- **Registrar** is defined to cover Registrars and Judicial Registrars to the extent that their powers are or were exercised by them under a delegation under the *Family Law Rules 2004* or the *Federal Magistrates Court Rules 2001* or a direction given under section 102 of the *Federal Magistrates Act 1999*. The definition is drafted in these terms to ensure that Registrars and Judicial Registrars have powers under Schedule 1 only to the extent of powers conferred on them by delegation or direction. This recognises that the parenting orders affected by the High Court's decision in *MRR v GR* may include orders of Registrars or Judicial Registrars without conferring any additional power.

5. Any other expression in Schedule 1 is taken to have the same meaning as in the Family Law Act.

Item 2: Meaning of affected order etc.

6. Item 2 defines additional key terms used in Schedule 1. The Bill creates new statutory rights and liabilities in response to 'affected orders', which are certain orders for which the courts did not consider 'required matters'.

7. Item 2(1) defines ‘affected order’ as a parenting order made before the commencement of the Bill that provides, or was made on the basis that another order provides, for the child’s parents to have equal shared parental responsibility for the child and for which the court or Registrar did not consider the ‘required matters’.

8. Item 2(2) defines ‘required matters’. The definition of ‘required matters’ differs according to whether or not the affected order was made with the consent of all parties to the proceedings in which it was made.

9. Where made without the parties’ consent, the required matters are the matters set out in paragraphs 65DAA(1)(b) and (2)(d) of the Family Law Act. These paragraphs require the court or Registrar to consider whether the child spending equal time with each of his or her parents is reasonably practicable and, if not, whether the child spending substantial and significant time with each of the parents is reasonably practicable.

10. The definition of ‘required matters’ for parenting orders made with the parties’ consent is broader, and includes all matters under subsections 65DAA(1) and 65DAA(2). Subsection 65DAA(1) requires the court or Registrar to consider whether the child spending equal time with both of the child’s parents is in the child’s best interests and is reasonably practical and, if it is, to consider making an order that the child spend equal time with both parents. If such an order is not made, subsection 65DAA(2) requires the court or Registrar to consider whether the child spending substantial and significant time with both of the child’s parents is in the child’s best interests and is reasonably practical and, if it is, to consider making an order that the child spend substantial and significant time with both parents. Separate findings by courts on each of these matters are unnecessary for orders reflecting agreement between all interested parties.

11. The definition of ‘affected orders’ extends to orders that have been varied, revoked, set aside, revived or suspended during the time they operated (Item 2(3)).

Item 3: Rights and liabilities under affected orders

12. Item 3 creates new rights and liabilities in relation to affected orders.

13. Item 3(1) provides that the rights and liabilities are the same as if the court or Registrar making the affected order had considered the required matters for the order. These rights and liabilities may, under Item 3(2), be exercised and enforced in the same way as similar rights and liabilities arising under an order made by the court or Registrar. They include the right to appeal against or apply for a review of the affected order (Item 3(3)).

14. Item 3(4) clarifies that parties may seek to appeal or apply for review of the affected orders on the ground that the courts had not considered the required matters when making the affected orders. For example, this preserves parties’ rights to challenge the affected orders on the grounds that the court did not make a finding as to whether the time arrangements were reasonably practical. Subject to the relevant court extending time for appeal or review where it has expired, parties dissatisfied with an affected order may challenge the affected order through an appeal or review or taking proceedings for an order under Item 6.

15. Item 3(5) confirms that Item 3 does not affect the operation of section 60CA of the Family Law Act in relation to an affected order. The best interests of the child remain the paramount consideration.

Item 4: Effect of things done etc. under or in relation to rights and liabilities

16. Item 4 provides for the effect of any acts done or omitted to be done in relation to rights and liabilities created by Item 3 in relation to affected orders.

17. Item 4(1) ensures that acts done (including civil enforcement action under Division 13A of Part VII of the Family Law Act), or omitted to be done, in relation to rights and liabilities created by Item 3 have effect for the purpose of any laws in the same way as if they were done or omitted to be done in relation to an order made under section 65D of the Family Law Act.

18. Item 4(2) prevents Item 4(1) from operating to validate or confirm a conviction against an enforcement law. 'Enforcement law' is defined in Item 4(3) as a Commonwealth law, other than one relating to contempt of court, which sets out a consequence for a person if the person contravenes or acts in a specified way while there is in force an order made by a court exercising federal jurisdiction. An example of such a law is section 65Y of the Family Law Act, providing for an offence where a child subject to a parenting order is taken or sent from Australia by a person who was a party to the proceedings in which the order was made.

19. Items 4(2) and 4(3) could be detrimental to persons who have contravened an affected order and who might otherwise be able to avoid the consequences of contravention under Division 13A of Part VII of the Family Law Act. These can include, for a serious contravention, a fine up to 60 penalty units, a community service order or imprisonment for up to 12 months. It would not be just or appropriate to allow persons who have intentionally disregarded parenting orders to be able to avoid these consequences. Item 4 ensures that an affected order can be, and always could have been, relied upon for acts done, or omitted to be done, relevant to parental responsibility, thereby promoting certainty for post-separation parenting arrangements. The parties to the proceedings in which an affected order was made will have regarded the order as binding upon them, and the order will have stated particulars of the consequences that may follow if a person contravenes the order. In addition, some of the orders available under this Division are intended to be remedial in nature (such as an order that a person attend a post-separation parenting class). There is a clear public benefit in ensuring that arrangements under parenting orders are upheld.

Item 5: Circumstances in which Item 3 ceases to have effect

20. Item 5 provides that Item 3 ceases to have effect when an affected order is replaced by a later order made by a court or Registrar on the basis that the affected order was or might be invalid. Until that later time the rights and liabilities created by Item 3 are the same as if the required matters had been considered when the affected order was made. It is not intended that Schedule 1 interfere with judicial findings of invalidity made before its commencement.

Item 6: Powers in relation to declared rights and liabilities

21. Item 6 provides for the powers of the courts in relation to the rights and liabilities created by Item 3.

22. Item 6(1) enables a court or Registrar to deal with a right or liability created by Item 3 in relation to an affected order in the same way as they could deal with a right or liability conferred, imposed or affected by a parenting order made under section 65D of the Family Law Act. It also ensures that a court or Registrar can, in the circumstances specified in Item 6(2)(b), make an order to achieve any other result that could have been achieved if the affected order had been an order made under section 65D of that Act.

23. To avoid doubt, Item 6(3) clarifies that, subject to one exception, the power under Item 6(1) to deal with a right or liability created by Item 3 is subject to the same conditions and limitations as apply to dealing with an order made under section 65D of the Family Law Act. The exception, set out in Item 6(4), is that a court or Registrar need not be satisfied, where the affected order was made in contested proceedings, that there are circumstances, required under the Full Court of the Family Court's decision in *Rice and Asplund* (1979) FLC 90-725, justifying reconsideration of how the best interest of the child should be best served before an order is made. The exception will assist families in any case where the arrangements under an affected order made by a court or Registrar were not reasonably practicable.

24. Items 6(5), (6) and (7) treat an order made under Item 6 dealing with a right or liability created by Item 3 by:

- the Supreme Court of the Northern Territory;
- the Family Court of Western Australia;
- the Federal Magistrates Court;
- the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia; or
- a court of summary jurisdiction of State or Territory

as a decree of a court exercising jurisdiction under the Family Law Act for the purpose of the appeal provisions of that Act.

25. It is not necessary to treat an order made under Item 6 by the Family Court constituted otherwise than as a Full Court in this way, as section 94 of the Family Law Act confers jurisdiction on the Full Court of the Family Court of Australia to hear an appeal from a decree of the Family Court exercising jurisdiction under that Act and also exercising jurisdiction under any law.

26. Items 6(5) and (6) also treat a decree or decision of a Judge of the Supreme Court of the Northern Territory or the Family Court of Western Australia, a Federal Magistrate or a Family Law Magistrate of Western Australia, rejecting an application that she or she disqualify himself or herself from further hearing an application to deal with a right or liability created by Item 3, as a decree or decision of that Judge or magistrate exercising jurisdiction under the Family Law Act for the purpose of the appeal provisions of that Act.

Item 7: Proceedings for contempt etc.

27. Item 7 further clarifies the power of courts in relation to the rights and liabilities created under Item 3. It provides that, where a person has interfered with a right conferred or affected by Item 3 or failed to satisfy or comply with a liability imposed by Item 3 in relation to an affected order made by the Federal Magistrates Court, the Family Court of Western Australia, a court of summary jurisdiction or a Registrar, the interference or failure can be dealt with in the same manner as if it had occurred in relation to a right or liability arising under a by a parenting order validly made under section 65D of the Family Law Act. This, for example, would give the relevant court the ability to deal with such interferences or failures under Division 13A of Part VII of the Family Law Act or as a contempt of court. The further clarification is not necessary for affected orders

made by the Family Court of Australia which, as orders of a superior court of record, remain valid until set aside.

Item 8: Evidence

28. Item 8 provides for the court record relating to an affected order to be used as evidence of the existence and details of a person's rights and liabilities created under Item 3.

Item 9: Schedule does not apply to certain orders

29. Item 9 ensures that Schedule 1 does not apply to any order declared or held to be invalid by a court before the commencement of Schedule 1. This preserves any finding of invalidity that was in place before the Schedule commences.

Item 10: Jurisdiction of courts

30. Item 10 provides for the jurisdiction of courts with respect to matters arising under Schedule 1.

31. Item 10(1) confers jurisdiction with respect to matters arising under Schedule 1 on the Family Court of Australia, the Federal Magistrates Court and the Supreme Court of the Northern Territory. Item 10(2) invests federal jurisdiction with the Family Court of Western Australia and State and Territory courts of summary jurisdiction with respect to matters arising under Schedule 1.

32. A court only has jurisdiction with respect to matters arising under Schedule 1 if it had jurisdiction with respect to an equivalent matter arising under the Family Law Act, and subject to the same conditions and limitations applying to it dealing with that equivalent matter (Item 10(3)).

SCHEDULE 2 - AMENDMENT

33. Schedule 2 amends the Family Law Act to ensure that there is no unnecessary complexity for families who can agree on parenting arrangements for their children.

Item 1: Subsections 65DAA(1) and (2)

34. Item 1 amends subsection 65DAA(1) and (2) of the Family Law Act, dealing with matters that the court must consider when a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, consequential on new subsection 65DAA(6) inserted by Item 2.

Item 2: At the end of section 65DAA (after the note)

35. Item 2 inserts new subsections 65DAA(6) and (7) in the Family Law Act.

36. Where a parenting order provides or is to provide that the child's parents are to have equal shared parental responsibility, paragraphs (a) to (c) of subsection 65DAA(1) require the court to consider whether the child spending equal time with both of the child's parents is in the child's best interests and is reasonably practical and, if it is, to consider making an order that the child spend equal time with both parents.

37. If such an order is not made, paragraphs (c) to (e) of subsection 65DAA(2) require the court to consider whether the child spending substantial and significant time with both of the child's parents is in the child's best interests and is reasonably practical and, if it is, to consider making an order that the child spend substantial and significant time with both parents.

38. New subsection 65DAA(6) continues, prospectively, what is achieved by the Bill for existing consent orders affected by the High Court's MRR v GR decision. Where parenting orders that are made with the consent of all the parties to proceedings provide for the parents to have equal shared parental responsibility, the court will be able, but will not be required to, consider the matters mentioned in subsections 65DAA(1) and (2) of the Family Law Act. The amendment ensures that appropriate weight is given to parenting arrangements agreed by parents. The best interests of the child remain the paramount consideration for parenting orders (new subsection 65DAA(7)).

Item 3: Application of amendments

39. Item 3 provides that the amendments made by Schedule 2 apply to any order made after the commencement of Item 3. This means that the amendments to section 65DAA will apply to any applications for orders that were made but not determined before that commencement, and any applications for orders made on or after that commencement.