Speech by

Andrew Powell

MEMBER FOR GLASS HOUSE

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TRANSPORT (RAIL SAFETY) BILL

Mr POWELL (Glass House—LNP) (3.10 pm): I, too, rise to contribute to the debate on the Transport (Rail Safety) Bill. The first element of the bill that I would like to address is the bill's aim to adopt an integrated approach to risk management to ensure that risks are assessed, evaluated and controlled jointly by those parties that will have a safety interface by virtue of the scope and nature of their intended operations. I also note the minister's comments in her second reading speech, particularly those related to level crossings, in that level crossing accidents pose the biggest risk to safe rail operations, with a possibility of catastrophic results. This bill also addresses safety at level crossings. For the first time in Queensland, legislation will require the state and local governments and private road owners to enter into agreements with rail transport operators as to how they will jointly manage level crossing safety.

I am concerned that this requirement may have onerous implications for private landowners. You do not have to look too far to see how many individuals will be affected. I imagine my colleagues who represent northern and western areas, who will shortly be contributing to this debate, will certainly give numerous examples of this in their electorates. It is suffice for me to say that examples also exist within the seat of Glass House, with constituents accessing their properties across the main north rail line. For their sake, I hope that this bill is not an attempt by the government to abrogate fully its responsibility for safety at such sites and that it becomes a burden for those individuals.

The second facet of the bill that I would like to dwell on for a moment relates to the concerns raised by the Scrutiny of Legislation Committee, particularly as they pertain to clauses 222 to 225 and clause 231. When it comes to imposing restrictions on the judicial system, the states have increasingly pushed the envelope. In this regard, perhaps over the years they were buoyed by High Court victories. The problem is that, with this buoyancy and the growing amount of national scheme legislation, the states may have pushed this envelope too far. The High Court has possibly drawn a line in the sand and chosen to uphold its constitutional foundation, as found in chapter 3.

I would like to refer briefly to Gerard Carney's book titled Constitutional Systems of the Australian States and Territories where it states—

Chapter III of the Commonwealth Constitution provides State courts with some measure of protection from State law. Primarily, it guarantees the existence of the State Supreme Courts, and it prevents legislative attempts to undermine the 'institutional integrity' of those State courts vested with federal judicial power. The latter protection may also provide State judges with some security of tenure. This protection applies whether the court is exercising State or federal judicial power. As a consequence of the coincidence of the State courts being used as repositories of federal judicial power, any impermissible interference in the exercise of their State jurisdiction inevitably undermines their independence in relation to the exercise of federal judicial power.

Three High Court decisions have given rise to suggestions that it—the High Court—is beginning to watch state legislation such as this bill very carefully. I will mention those three cases. The first was Kable v DPP in New South Wales in 1996. Again, I refer to Gerard Carney's book in summing up the outcomes of that case. He states—

A majority of the High Court in Kable held that the States were prevented from vesting powers in their courts incompatible with the exercise by those courts of federal judicial power. Accordingly, New South Wales legislation which empowered the New South Wales Supreme Court to order the continued detention of Gregory Wayne Kable if the Court were satisfied that he was 'more likely than not

to commit a serious act of violence', was held invalid as incompatible with the exercise of federal judicial power because it tended to undermine public confidence in the independence and integrity of the Supreme Court as a repository of federal judicial power.

Gerard Carney goes on to state—

Clearly, their integrity and independence is not divisible between jurisdictions. This was recognised by McHugh J in Kable:

> Because the State courts are an integral and equal part of the judicial system set up by charter III, it also follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power.

The second case is that referred to by the Scrutiny of Legislation Committee in the *Legislation Alert* and that is the International Finance Trust v NSW Crime Commission 2009. Whilst the clauses in the New South Wales legislation that were struck down by the High Court were dissimilar to those in this bill, the High Court's concern is consistent. Even those judges who dissented from the overall ruling commented in their report that moves to limit the powers of the court were 'repugnant to the judicial process as understood and conducted in Australia'.

The final case is Kirk v Industrial Relations Commission of New South Wales in February of this year. The salient points have been really well captured in this article in the Australian*,* published on 5 February 2010. It states—

Constitutional law experts say the decision on Wednesday in which the conviction of an employer by the NSW Industrial Relations Court was overturned, will make it much harder for the states to insulate their specialist courts, tribunals and panels from review by higher courts.

Although the state's industrial laws ban appeals against IRC decisions, the High Court agreed to review the conviction of hobby farmer Graeme Kirk over the accidental death of his farm manager, Graham Palmer, at Picton, southwest of Sydney, in 2001.

The High Court said state governments could not prevent supreme courts from reviewing decisions where specialist courts exceeded their power.

In the Kirk case, the IRC had overreached by convicting the farmer when prosecutors had not identified what he should have done to avoid the accident. It also breached the laws of evidence by allowing him to be called as a prosecution witness.

In his judgement, High Court judge Dyson Heydon said: 'A major difficulty in setting up a particular court, like the industrial court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary.'

'Another difficulty in setting up specialist courts is that they tend to become overenthusiastic about vindicating the purposes for which they were set up.'

The High Court's decision could reduce the power of 'privative clauses', which restrict appeals to the mainstream courts, from thousands of state-based bodies.

These include industrial courts, land and environment courts, tenancy tribunals, prisoners' tribunals, and anti-discrimination bodies.

That brings me to the clauses in question. As I said, the *Legislation Alert* refers to clauses 222 to 226 and clause 231, which respectively prohibit a relevant person from disclosing restricted information to any person or to a court; prohibit a person who has had access to restricted information from disclosing it to any person or to a court; provide specified, limited exceptions to the prohibition in clause 222; prohibit a court from requiring disclosure of restricted information; and provide that a person who is or has been a relevant person would not be obliged to comply with a subpoena or similar direction of a court to attend and answer questions about an occurrence if the chief executive had issued a certificate under section 230 for the person in relation to the occurrence, and that a relevant person would not be compellable to give any expert opinion in any civil or criminal proceedings in relation to rail safety. Further down in that chapter the committee invited the minister to provide further information regarding whether the legislation might be repugnant to the judicial process as understood and conducted in Australia.

As I said, the High Court has indicated that the judicial power of the Commonwealth requires certain things of the courts which exercise that power and, to the extent that state legislation infringes on Commonwealth legislative power, the High Court, or sometimes the state Supreme Court, will step in. One thing required of courts exercising federal judicial power is that they exercise their functions in accordance with principles of natural justice. We saw that in Leeth v The Commonwealth in 1992. Another is that the exercise of judicial discretion not be unduly usurped such as in relation to whether evidence is admissible, as we saw in Nicholas v The Queen in 1988 and, it is imagined, similar issues regarding judicial discretion such as the compellability of witness. It is arguable that the identified provisions of the bill may impose a non-judicial requirement inconsistent with the exercise of judicial power. While the Land Court itself may not exercise federal judicial power, the limitations on it would extend to limit powers of appellate courts including those exercising federal judicial power.

Given that we will not have an opportunity to receive the written response from the minister before the passing of this bill, would the minister give consideration to addressing in her summing up these concerns as they are raised in those clauses 222 to 226 and 231. With that I commend the bill to the House.