

Transport for NSW

Review of the Roads Act 1993

Department of Communities and Justice

Review of the Crimes Act 1900

Unions NSW Submission
June 2024



About Unions NSW

Unions NSW is the peak body for trade unions and union members in New South Wales. We have 48 affiliated trade unions and trades and labour councils, who collectively represent more than 600,000 union members working across all industries in NSW, including in all areas of the NSW public sector.

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Part A: Introduction

1. Unions NSW provides this submission to two reviews:
 - a. the Transport for NSW' review of the *Roads Act 1993* (NSW) (**Roads Act**); and
 - b. the Department of Communities and Justice review of the *Crimes Act 1900* (NSW) (**Crimes Act**).
2. In April 2022, the *Roads and Crimes Legislation Amendment Act 2022* (NSW) ("**2022 Amendments**") expanded an existing criminal offence and introduced a new offence to combat "disruptive" protest activity. They are:
 - a. The existing offence in s 144G of the Roads Act of the disruption "major tunnels and bridges" was expanded to include the disruption of "major roads".
 - b. A new offence was inserted as s 214A of the Roads Act, which criminalised the disruption of a "major facility".
3. For these reviews, Unions NSW's recommendation is:

All amendments made by the *Roads and Crimes Legislation Amendment Act 2022* (NSW) should be repealed, as:

- there are existing provisions in current legislation which provide significant and sufficient police powers to deal with these matters; and
- these provisions are excessive and offend the right to peaceful assembly and protest, which is fundamental to democratic societies such as NSW.

4. Unions NSW's three key concerns with the 2022 Amendments are:
 - a. The speed at which the legislation was rushed through Parliament, less than 30 hours from when it was first introduced to Parliament,¹ and the absence of community consultation until these reviews. The passing of such contentious legislation at this speed is undemocratic, as it does not provide an opportunity to debate the merits of such legislation. There has not been an opportunity to minimise unintended consequences.
 - b. The breadth of s 144G of the Roads Act and s 214A of the Crimes Act, and the broad discretion of the relevant Ministers to declare additional roads and locations. (See **Part D** of this submission)
 - c. The inadequacy of the industrial activity and workplace "carve-outs" in protecting all business-as-usual union campaigning. (See **Part E** of this submission)

¹ *Kvelde v State of NSW* [2023] NSWSC 1560, [9]

Structure of this submission

5. Part B provides context about the role of protest in union advocacy and campaigning.
6. Part C explains the essential characteristics of the right to protest in a democracy and considers whether NSW laws facilitate the right to protest.
7. Parts D and E are the core parts of this submission. These parts elaborate on the latter two of Unions NSW's three key concerns regarding the 2022 Amendments.

Broader context of anti-protest laws

8. While other anti-protest laws are not subject to these two reviews, it is important to contextualise the 2022 Amendments within the broader anti-protest legal architecture created by the former LNP NSW Government.
9. The 2022 Amendments are another set of laws that further criminalise peaceful assembly and protest after the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW) and the misleadingly named *Right to Farm Act 2019* (NSW). Together, these laws expanded police powers to search and seize and give move on directions and introduced laws which further eroded the right to protest under the guise of protecting farmers.
10. We urge the current Labor NSW Government to consider the appropriateness of anti-protest laws generally, beyond the current reviews into the 2022 Amendments.

Part B: Unions and protest in a robust democracy

11. Unions NSW and our affiliated trade unions have a proud tradition of public campaigning, protest and industrial action. We strive for a fairer and more equitable society by campaigning on our core issues – labour and industrial issues, as well as broader economic, social, environmental, and human rights issues. Unions campaign in solidarity with each other and with a diverse range of civil society groups.
12. A core part of a democratic society is the right to protest. Protests increase public and media visibility of issues and are a legitimate campaign tactic to raise community awareness and to pressure decision-makers to address the relevant concerns that form the subject of the protest.
13. Many of our significant and valued workplace rights were won because of union-led protests, such as the 8-hour workday,² minimum wage,³ equal pay,⁴ annual leave,⁵ and health and safety.⁶ Further, broader rights such as universal suffrage and Medicare⁷ were also won as a result of protest.
14. The iconic cultural celebration of the Sydney Gay and Lesbian Mardi Gras was also born out of protest in 1978.⁸ The Builders Labourers Federation’s strike action against the demolition of historic buildings known as the Green Bans was instrumental in preserving The Rocks and other cultural heritage sites in Sydney.⁹

Types of union campaigning affected by the 2022 Amendments

15. There are many types of union campaigning activities which could be described as “protest” and could be affected by the 2022 Amendments.
16. The most directly relevant to labour and industrial issues is **strikes**, being work stoppages by workers to protest wages and working conditions.
17. There are also **pickets or community actions** which may be part of strikes. They involve protesting at (or outside) a workplace or another significant location. They are not necessarily attended just by the workers themselves, and may include family, friends and community members. Pickets and community actions include

² See Sean Scalmer, ‘[Lessons from the campaign for the eight hour day](#)’, *Australian Trade Union Institute* (online, 24 April 2023)

³ See ‘[The history of the minimum wage](#)’, *Australian Trade Union Institute* (online, 30 June 2021)

⁴ See ‘[Victory in the ASU’s campaign for Equal Pay](#)’, *Australian Trade Union Institute* (online, 28 January 2021)

⁵ See ‘[How unions won the right to annual leave](#)’, *Australian Trade Union Institute* (online, 30 May 2020)

⁶ See ‘[Union campaigns for workplace health and safety](#)’, *Australian Trade Union Institute* (online, 17 July 2020)

⁷ See ‘[How unions helped build Medicare](#)’, *Australian Trade Union Institute* (online, 30 January 2022)

⁸ See ‘[The First Mardi Gras](#)’ 78ers (online, date unknown)

⁹ See ‘[Defining Moments: The First Green Bans](#)’ *National Museum of Australia* (online, date unknown); ‘[Rocking the Foundations](#)’, *Australian Trade Union Institute* (online, date unknown)

“persuasive” conduct such as educating the public about the reasons behind a protest of strike.

18. Examples of pickets or community actions include the 2022-23 University of Sydney strikes where students linked arms with their lecturers in solidarity picket lines,¹⁰ and the 1998 Patrick Waterfront Dispute where the community organised pickets in support of sacked dock workers.¹¹
19. Unions also organise or participate in *rallies*, which are large public gatherings held to demand industrial, political or social change. Often, *marches* will accompany rallies, where attendees at a rally will walk in a large group to a significant location, such as Parliament.
20. Unions NSW is concerned the 2022 Amendment has a “chilling effect” on these business-as-usual union campaigning, in particular pickets and community actions. We deal with this issue in more detail in **Part E** below.

¹⁰ See '[Strike! Looking back on the historic campaign](#)' *Honi Soit* (online, 1 August 2023)

¹¹ See '[Struggle, Solidarity and Unity: 150 Years of Maritime Unions in Australia: The 1998 Waterfront Dispute](#)' *Australian National University Archives* (online, date unknown); '[MUA: Here to Stay! The 1998 Waterfront Dispute](#)' (online, 1 April 2022)

Part C: The characteristics of the right to protest

21. For the purposes of this submission, we describe four essential characteristics of the right to protest in a democracy. This list is not meant to be exhaustive.¹²
22. We say NSW laws do not facilitate and has a “chilling effect” on the essential characteristics of the right to protest.
23. **First**, protests should not need to be “authorised” by the government to be allowed to occur.
24. In NSW, protestors have a common law right to peaceful assembly. Part 4 of the *Summary Offences Act 1988* (NSW) (**SO Act**) provides for a system of “authorising” these public assemblies or protests. For a protest to be “authorised”, protests organisers must apply with 7 days’ notice to the Police Commissioner. There is no express statutory guidance for the police (or courts) to determine whether a protest should be “authorised”. “Authorisation” provides a limited immunity for protestors in relation to certain obstruction offences. Part 4 of the SO Act is intended to facilitate the common law right to peaceful assembly by encouraging cooperation between protestors and police.
25. Although Part 4 of the SO Act refers to an “authorisation” procedure, it is more strictly a “notification” process to the Police Commissioner. However, the lack of statutory guidance for the police or courts to determine whether a protest should be “authorised” leaves these institutions with a wide discretion. Some commentators are concerned that the wide discretion coupled with police discretion with move on powers has become in practice a system of authorising protests.
26. Unions make every effort to cooperate with the “authorisation” process in the SO Act especially at rallies and marches. However, protests such as strikes and pickets have an immediacy that is not suited to a prescriptive 7-day notification process. Our laws must facilitate spontaneous process. For example, protests and pickets in response to mass sackings such as the 1998 Patrick’s Waterfront Dispute and 2021 Qantas’s sacking of baggage handler simply must happen immediately.
27. **Second**, laws regulating protests should not be so broad and vague that participation in peaceful protest is criminalised. **Third**, protests should be allowed in all public places (including “private” places for public use) and in workplaces.
28. The second and third characteristics relate directly to the 2022 Amendments. Sections 214A of the Crimes Act and 144G of the Roads Act are broad and vague and criminalise protest in a wide range of public places.

¹²For a more comprehensive list of characteristics, see e.g. ‘[Declaration of our right to protest](#)’, *Human Rights Law Centre* (online, 22 November 2023)

29. Fourth, “[t]he right to protest means very little if it doesn’t include the right to disrupt”.¹³ Protests may cause disruption to everyday life. Our governments and laws must accept and tolerate some level of disruption will occur as part of protest in a robust democracy.
30. Disruption does not necessarily mean a protest is violent or not peaceful. “The whole point of a public protest is to gather attention to encourage people to *stop and reflect and listen* to the message that’s being conveyed”.¹⁴
31. As should be obvious, the freedoms we have in 2024 would not have been possible without some disruption caused by protests from previous generations of activists. Provided below are some NSW and Australian examples of these “disruptive” protests that would have been affected adversely by the 2022 Amendments.



1969-1970 Zelda D’Aprano equal pay protest¹⁵

In 1969, to protest the systemic undervaluation of work in female-dominated industries, Zelda D’Aprano chained herself to the Commonwealth Building (in Melbourne). The next year, in 1970, she and two other unionists, Alva Giekie and Thelma Solomon, chained themselves to the doors of the Arbitration Commission. Zelda stated “There was just sufficient chain to allow the door to open slightly, and people had to bend down and crawl in sideways to enter the building. This was so undignified for the “important” people.” In 1972, the Arbitration Court determined that there should be “equal pay for work of equal value.” The legacy and product of Zelda’s disruptive behaviour lives on – as groundbreaking gender pay equity provisions in the FW Act that were legislated in 2022.

¹³ Quoting Professor Luke McNamara of UNSW in '[Explainer: What are your rights to protest in Australia?](#)' *Australian Human Rights Institute* (online, date unknown, likely 2022 or 2023)

¹⁴ Quoting Professor Luke McNamara of UNSW in Melissa Compagnoni '[Navigating the implicit right to protest in Australia](#)' *SBS* (online, 9 April 2024)

¹⁵ See '[Zelda D’Aprano’s Equal Pay protest](#)', *Australian Trade Union Institute* (online, 13 October 2023)



1970s Green Bans¹⁶

In the 1970s, Builders Labourers' Federation union led by Jack Munday disrupted the demolition of many of Sydney's historic sites by placing "green bans" on them. There were many "disruptive" protests at the demolition sites, including The Rocks where Jack Munday was arrested. The protests ultimately worked and led to the preservation of iconic Sydney heritage sites such as The Rocks and Centennial Park.



1978 Sydney Gay and Lesbian Mardi Gras¹⁷

In June 1978, the activists Gay Solidarity Group organised a parade marching down Oxford Street as a call for gay rights and as a celebration. The parade was not authorised by the police. 53 people were arrested. The second Mardi Gras parade in 1979, was attended by 3,000 people and no arrests were made. The parade continued as a call for LGBTIQ+ people to be accepted and protected from discrimination. It is now a highlight in Sydney city's calendar and attracts hundreds of thousands of people cross the country around the world, who attend Sydney to celebrate the pride and diversity of the LGBTIQ+ community.



1998 Patrick Waterfront Dispute¹⁸

In April 1998, the Patrick Stevedores corporation terminated the employment of all of its stevedoring workers overnight. The employer wanted to de-unionise its workforce and recruited non-union workers to replace the union workers. There was a picket line with a large number of community activists who obstructed access by Patrick's attempt to move cargo. The community picket line, as part of an overall union campaign was instrumental in achieving the reinstatement of a large portion of the workforce.

¹⁶ See '[Defining Moments: The First Green Bans](#)' *National Museum of Australia* (online, date unknown); '[Rocking the Foundations](#)', *Australian Trade Union Institute* (online, date unknown)

¹⁷ See '[The First Mardi Gras](#)' *78ers* (online, date unknown)

¹⁸ See '[Defining Moments: The First Green Bans](#)' *National Museum of Australia* (online, date unknown); '[Rocking the Foundations](#)', *Australian Trade Union Institute* (online, date unknown)

Part D: Breadth of the 2022 Amendments

32. A significant problem with s 144G of the Roads Act and s 214A of the Crimes Act is the incredible breadth of its potential for vast application made under ministerial discretion with little if any oversight:
- Firstly, in the breadth of locations in which protest is criminalised, including on a wide range of public roads, bridges, and tunnels, and public and private “major facilities”.
 - Secondly, in the broad discretion of the relevant Ministers to declare additional roads and major facilities by regulation with little oversight.
33. The expansive way in which the 2022 Amendments criminalises protests in public spaces is undemocratic and lacks any oversight or limitations. As stated above, peaceful protests should be permitted in all public areas (whether “authorised” or not), and laws regulating protests should not be so broad that they criminalise participation in peaceful protest.
34. These offences carry significant maximum sentences, up to two years jail and \$22,000 in fines.¹⁹ Our view is that these sentences are disproportionate, especially in relation to the “disruption” or “obstruction” limb of the offences, which apply to non-violent or peaceful protests. Further, existing laws already criminalise damage to property. It is unnecessary for there to be multiple laws to address the same type of conduct.
35. It is unclear what problem these provisions are trying to solve. In the *Knitting Nannas Case*,²⁰ the Supreme Court of NSW struck down the worst excesses of s 214A of the Crimes Act (the “partial closure” and “redirected” limbs) for infringing the implied freedom of political communication in the Australian Constitution.

Breadth of location

36. Before April 2022, s 144G of the Roads Act in effect criminalised only protest on the Sydney Harbour Bridge. Even though the provision also referred to the criminalisation of “major bridges” and “major tunnels”, none were prescribed by the regulations.
37. In April 2022, the scope of s 144G regarding where protests are criminalised was significantly broadened. The NSW LNP Government achieved this by amending the Roads Regulations 2018 (NSW) multiple times, inserting cl 48A in the regulations to broadly define “major bridge, tunnel, and road.” This definition categorises any bridge or tunnel in Greater Sydney, Wollongong, and Newcastle as a “major” bridge

¹⁹ Sections 144G(1) of the Roads Act and 214A(1) of the Crimes Act.

²⁰ *Kvelde v State of New South Wales* [2023] NSWSC 1560

or tunnel. Every “main road” is categorised a major road.²¹ This expansive definition misrepresents the term “major” when in fact it refers to virtually any bridge or tunnel, and any road that is worth protesting on. As such, the 2022 Amendments appear to seek to confine protest only to back roads and alleys.

38. Similarly, the term “major facility” in s 214A also has an expansive definition. The NSW LNP Government inserted a new cl 4A and Sch 1 into the Crimes Regulation 2020 (NSW) to prescribe a long list of “major facilities” which include:²²
- a. 41 railway and metro stations;
 - b. 2 ferry terminals (as “other public transport facilities”);
 - c. 2 passenger or cruise terminals (as “ports”); and
 - d. 18 “infrastructure facilities”, including power stations, airports, steelworks, oil terminals, an aluminium smelter, a logistics centre, the State Health Emergency Operations Centre, the Sydney Desalination Plant and the Woolworths Distribution Centre.
39. The relevant Minister (through the Governor) has a broad discretion to continue to add to the list of “major facilities” by regulation. It is noteworthy and concerning that these provisions have such breadth – including to include declaring private facilities such as the Woolworths Distribution Centre to be a “major facility”. The concern is that the NSW Government can through this power, continue to add to the list of sites that it does not want people to protest at, thereby setting up a system where its citizens can only protest where the government chooses to.

²¹To understand the breadth of locations that are ‘main roads’ see Transport for NSW’s [‘Schedule of Classified Roads and Unclassified Regional Roads’](#) (Version 16, February 2023). This document lists 644 ‘main roads’, within the meaning of s 48 of the Roads Act. Each ‘main road’ is a long stretch of road, in addition to highways. Protest without authorisation on these main roads and highways attracts potential criminal liability under s 144G Crimes Act.

²² Borrowed from Walton J’s list in *Kvelde v State of New South Wales* [2023] NSWSC 1560 [11]

Part E: Inadequacy of industrial activity and workplace “carve-outs”

40. Unions NSW does not believe the industrial activity and workplace “carve-outs” are adequate to protect all types in business-as-usual union campaigning and their participants.
41. Both offences in s 214A of the Crimes Act and s 144G of the Roads Act have the same “carve-outs”, being that the offences do not apply to conduct which:
- forms part of industrial action, an industrial dispute or industrial campaign
 - occurs at the workplace at which the person works or at workplace owned, occupied, operated or used by an employer of the person.
42. These carve-outs appear quite encompassing. However, on examination of the provisions and case law, there are potential gaps in the coverage of the carve-outs such that they may not operate to protect all business-as-usual union campaigning. In this submission, we discuss three potential inadequacies.
43. The **first** inadequacy relates to the types of participants are protected by the “industrial action, an industrial dispute or industrial campaign” carve-outs. The concern is that the descriptor “industrial” may operate to limit the scope of these protections. The reason for this concern is the descriptor “industrial” in a term has often been interpreted to require the presence of an industrial matter, being “matters pertaining to the relationship between employers and employees”.²³ Within this meaning, while employees are no doubt participants in an “industrial” action, an industrial dispute or industrial campaign, union officials and community and student picketers may not be.
44. The **second** inadequacy is that terminated employees may not be protected by neither the “industrial” nor “workplace” carveouts. Given they have been terminated, they no longer work at that workplace. Terminated employees are *former* employees, and their dispute may cease to be “industrial” in nature. This inadequacy is concerning. This is because, for example, some of the most important protests and pickets are in response to the mass termination of employees which occur quickly and without necessarily having gone through an “authorisation” process. As such, these types of protests and pickets may still be captured by these offences despite the “industrial” carve-out.
45. The **third** inadequacy relates to what the carve-out of “industrial action” means, and whether it extends to conduct such as picketing. The term “industrial action” is defined neither in the Crimes Act nor the Roads Act and there are several possibilities as to its meaning.

²³ *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297; [1983] HCA 19 at [38]

46. One possible source is how courts have interpreted the term “industrial action” in other statutes. The term “industrial action” is most commonly found in industrial legislation, both state and federal, such as the *Industrial Relations Act 1996* (NSW) (**IR Act**),²⁴ s 19(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) (and predecessor s 4 of the *Workplace Relations Act 1996* (Cth) (**WR Act**)), and the s 36(1) of the now repealed *Building and Construction (Improving Productivity) Act 2016* (Cth) (**BCI Act**).
47. Despite “industrial action” being defined in a similar way in all four statutes, courts have been divided on whether pickets constitute “industrial action”. On the one hand, in interpreting term “industrial action” under the former WR Act, a majority of the Full Federal Court found in *Dauids Distribution* that pickets were not “industrial action”.²⁶ Conduct on pickets that were “persuasive” such as educating the public about the reasons behind a protest or strike or encourage workers to participate in the strike were not found to be “industrial action”.²⁷ A picket line obstructing access to a distribution centre was also found to not have been “industrial action” because it interfered with the employer’s common law right of nuisance.²⁸
48. On the other hand, cases interpreting similar provisions under the NSW IR Act (e.g. *Bluescope Steel v AWU*²⁹ and *NUW v TNT Australia*³⁰) and the BCI Act (*Director of FWBII v CFMEU*³¹) have held that pickets are “industrial action”. Given this division in judicial opinion, it is unclear whether pickets will be protected from criminal liability in relation to these offences.

²⁴ See s 4 and the Dictionary in the IR Act

²⁶ *Dauids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108. Please note that even though *Dauids Distribution* was decided under the former WR Act, it remains “good law” under the FW Act as the FW Act largely replicates the provisions of the WR Act.

²⁷ *Dauids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108 [51]

²⁸ *Dauids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108 [71]–[76]

²⁹ *Bluescope Steel (AIS) Pty Ltd v Australian Workers’ Union (NSW)* [2006] NSWIRComm 274

³⁰ *National Union of Workers (NSW) v TNT Australia Pty Ltd* [1997] NSWIRComm 104

³¹ *Director of the Fair Work Building Industry Inspectorate v CFMEU* (2015) 238 FCR 223

Part F: Conclusion

49. In this submission we have shown the unreasonable breadth of the 2022 Amendments and how they curtail the right to protest. We have also shown that despite the industrial activity and workplace carve-outs, there are inadequacies in their protection of certain business-as-usual union campaigning.
50. In a democratic NSW, the government should not restrict the right to protest without a clear and compelling justification. If these laws remain in place, they will further erode our democracy and the rights of its citizens.
51. As such, we recommend that amendments made by the *Roads and Crimes Legislation Amendment Act 2022* (NSW) be repealed.