

31 May 2024

Director, Law Enforcement and Crime Team Policy
Reform and Legislation Branch
Department of Communities and Justice
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By Email: policy@dcj.nsw.gov.au

Dear Sir/Madam

The *Roads and Crimes Legislation Amendment Act 2022*, known as the NSW anti-protest laws was rushed through the parliament in a matter of days after late night sittings and finally introduced by the Perrottet Government in April 2022.

These laws are fundamentally flawed. There was no public consultation process or parliamentary Committee of Inquiry before they were enacted, and the laws are so broad that they provide extraordinary power to police. Any group of people can now face serious criminal charges simply by protesting near a public facility or causing people to be redirected around them.

We would never support actions that are violent or that put the public at risk. However, since their implementation it has been very clear that the laws have been used almost exclusively by police to stop political protests. While these protests may be inconvenient, they could not in any circumstances be framed as a threat to the state warranting the overreach implied by these laws, which we believe to be unnecessary and counterproductive. They were introduced by the Perrottet Government to deal with people who they held in disdain for entirely ideological reasons. Prior to their introduction, there were already effective laws to deal with people who engage in dangerous or violent actions. Those laws were well known and well used by police.

The right to protest is fundamental to our democracy. The union movement has a long and very proud history of engaging in protest unconscionable laws and on issues of justice and equity. These protests have been essential in making fundamental and positive changes, including our own union's campaign for paid family and domestic violence leave and for your government's new legislation to deal with coercive control.

These are bad laws. They are unnecessary and counterproductive. They undermine our democracy. They must be removed.

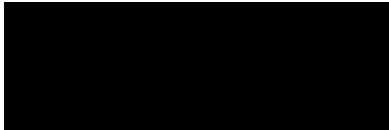
The Union's submission is a statement about the right to peaceful protest as a public issue. It also responds to the specific issues of concern to this Review of *s144G Roads Act*, which is the law restraining protests on major roads, tunnels, and bridges. We are also providing a detailed submission to the associated Review of *s214A of the Crimes Act* which is the law restraining protests at major facilities such as railways stations and ports. It should be said that in practical terms it is very difficult to separate the current anti-protest legislation in this manner. Many of the issues of concern to us are inevitably the same.

Many of our members and the organisations for which they work have made their own detailed submissions to this Inquiry, based upon their professional expertise. We respect the

experience and skill of our members expressed in those submissions. We particularly take this opportunity to thank those who have shared their expertise and experience with us as an essential part of preparing this submission.

In view of recent examples of their misuse, we would be happy for an opportunity to meet with you to provide discuss the potential for these laws to be rescinded. We wish you well with your deliberations and look forward to hearing from you at your first opportunity.

Yours faithfully

A solid black rectangular box used to redact the signature of Angus McFarland.

Angus McFarland
Branch Secretary
Australian Services Union NSW & ACT (Services) Branch



Australian Services Union NSW & ACT (Services) Branch

Submission

Review of s214A of the Crimes Act

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The ASU is in a unique position to respond to this Review.

The Australian Services Union (ASU) is the one of the largest and fastest growing unions in the country. The Union represents workers throughout the not-for-profit and the social and community services sector, in local community services, national, regional, and state-wide organisations, community partnerships and hubs, all of the major charitable organisations and trusts, all of the social and community sector peak organisations, and all of the major faith-based organisations. Our members are employed in every metropolitan, regional, rural, and remote community in NSW. They are employed by organisations that provide specialist services, care, and support for some of the country's most vulnerable people.

Our members work in every community legal centre and major policy and advocacy organisation across the country. Those organisations include those representing First Nations communities, people with disability, women, LGBTIQ+ communities, environmental and climate activist groups, human and animal rights organisations, overseas aid agencies, and a range of other civil liberties and law reform groups. The Union represents people who are most likely to be involved as protesters, or supporting others who are protesting on a range of issues of public concern. We also represent those who are most likely to be engaged to provide legal advice and support to those who are arrested and charged at protest rallies.

ASU members are also employed throughout the public transport sector, most particularly by Sydney Trains, NSW Trains, Sydney Ferries, and at all airports, where they are employed at stations, terminals and major transport hubs and interchanges. These are all included as *major facilities* in the legislation that is subject of this Review.

Background

The *Roads and Crimes Legislation Amendment 2022* passed in the NSW Legislative Council, on 1 April 2022 after two days of debate and received Royal Assent on the same day. The (then) Perrottet Government forced the House to sit late to ensure the passing of the legislation and unlike most controversial legislation, there was no Committee of Inquiry or any other form of public consultation. The legislation was supported by the Opposition.

The legislation was introduced following protests at Port Botany and Newcastle Ports involving the climate protest group, *Blockade Australia*, and other protests impacting the Spit Bridge by the protest group, *Fireproof*. Some members of these groups were subsequently charged and gaoled under the new legislation. Some were deported in following weeks. Since the introduction of the legislation in 2022, there have been dozens of arrests associated with a range of protests. Many of those arrested have been charged with Traffic and other offences. Many have also been charged either separately or in addition under the new *Roads and Crimes Legislation Amendment* (hereinafter *anti-protest laws*).

When the legislation was first introduced, many of those charged were represented by lawyers employed in community legal centres, including the Environmental Defenders' Office. Those workplaces and their employees are members of the Australian Services Union NSW ACT Services Branch, (ASU). In the protests that followed since the legislation was introduced in 2022, ASU members in community legal centres have continued to be at the forefront of providing legal support and representation to those who have been arrested and charged under the legislation.

ASU members have also been significantly represented among those who have participated in these and other protests at which arrests have been made. As union activists, our members are more likely to be aware of and active in their opposition to inequality and injustice. They are therefore more likely to be involved in protest actions. Given the nature of the work they do, and the organisations for which they work, our members are also far more likely to be

involved in providing support to other individuals and communities engaged in protest activities. Where they are employed in the transport industry, they are likely to be involved in managing infrastructure defined as a major facility and have responsibility for redirecting people around those facilities during protests and at other times.

What the anti-protest legislation does

The *Roads and Crimes Legislation Amendment Act 2022* radically expanded existing legislative provision making it an offence to cause disruption on the Sydney Harbour Bridge or other major bridges and tunnels. Under s144G *Roads Act*, causing disruption on any tunnel, road or bridge chosen by the government, or under s214A of the *Crimes Act* obstructing a railway station, port, or infrastructure facility, is punishable by up to two years' imprisonment and a \$22,000 fine. Rallies, marches, and other gatherings that are commonly held as part of community and union campaigns are at risk from this law. If a gathering causes people attempting to use a major facility to be redirected, this counts as obstructing the major facility. A major facility includes most railway stations in Sydney, including Town Hall Station, and Martin Place Station, where public gatherings are regularly held.

Importantly, the legislation includes provisions that have already been utilised, allowing the Minister to extend the list of roads, bridges, and tunnels and 'major facilities' by *regulation* – which does not have to pass Parliament. Effectively any road, bridge, tunnel, or other facility could be defined in this way at any time without the knowledge of the public, including unions, who are planning a rally or other public event.

Public protests necessarily involve people *putting feet on the street*. Protesting on or near a major road, tunnel or bridge cannot in practical terms be separated from intending to protest at or near a so-called *major facility*; particularly when the list of roads, bridges, tunnels and major facilities can be changed without notice at any time, without reference to any impartial arbiter. In this context, the Minister has extraordinary discretionary power to direct NSW Police to enforce legislation that is for all intents and purposes unlimited in its scope and impact.

For these reasons it is difficult to separate s144 of the *Roads Act* from s214 of the *Crimes Act* and we have found it unavoidable to make reference to both parts of the legislation in the course of making these separate submissions. However, we have made two submissions in accordance with the directions for these Reviews.

s214A Crimes Act

Policy objective: Striking a proper balance between the right to protest and the right of members of the public to move freely and not be obstructed in public places.

The stated policy objective of the 2022 amendments to s214A *Crimes Act* is to strike a proper balance between the right to protest and the right of members of the public to move freely and not be obstructed in public places.

In his Second Reading Speech, Mark Speakman, who was Attorney General in the Perrottet Government said: *The [The Roads and Crimes Legislation Amendment] bill in no way seeks to impose a general prohibition on protests. The Government supports the rights of all individuals to participate in lawful protest. Freedom of assembly and speech have long been recognised by Australian courts as important rights that are integral to a democratic system of government; however, the right to protest must be weighed against the right of other members of the public to move freely and not be obstructed in public places.* Shadow Attorney General, Michael Daley said: *In balancing these rights, the government must have particular regard to the significance of the right to peaceful protest for the realisation of democracy.*

Contrary to this stated objective, given that s214A applies to (any and all) railway stations, ports, or infrastructure facilities, frequently used for the purpose of protest, the restriction on people's freedom is very significantly impacted. For the purposes of S214 conduct that causes any obstruction of a railway station, port, or infrastructure facility, resulting in closure or pedestrians to be redirected is automatically defined as *serious disruption* for the purposes of the offence.

The impact of the legislation is compounded by the imposition of a sentence of imprisonment and vastly increased financial penalty, which is ten times larger than the previous fine, for conduct including *causing pedestrians to be redirected or part of a major road being closed*.

The former Attorney General, Mark Speakman, now Leader of the NSW Opposition, and current Attorney General Michael Daley made clear their respective Parties' view that NSW citizens have a fundamental political right to affiliate, communicate and act in protest. This view is reflected in the community and most certainly upheld by civil society organisations. The ASU was at the forefront of more than 120 community organisations including the Australian Council of Social Service (ACOSS), Community Legal Centres NSW, and NSW Council for Civil Liberties signed an Open Letter, calling for Australian governments to respect these fundamental protest rights through a *Declaration of our Right to Protest*.

If we accept the stated position of the state's two foremost legal officers, and that of civil society, then in practical terms s214 imposes very significant new constraints and disproportionate penalties on those who seek to protest in a public place and who use public roads. Given those stated views, while a protest meeting or march in the vicinity of major public infrastructure might be regarded as an inconvenience, this is a relatively insignificant imposition on the rights of the public to move freely relative to the likely chilling effect on people, including unions who might wish to exercise a fundamental political right to affiliate, communicate and act in protest.

By prioritising the keeping public spaces, including public infrastructure free of obstruction, the impact of s214 is a disproportionate constraint, likely to have a significant chilling effect on the ability to utilise public spaces, including the public infrastructure and the vicinity for political affiliation, communication, and protest. In doing so, it effectively denies the community, including unions the right to engage in protest without risking significant penalties.

This view is reflected in the Decision of the Supreme Court in *Kvelde*, which found that restricting interruptions [by protesters] to major facilities under s214 of the Crimes Act was an impermissible burden on the freedom of political communication. It is difficult to avoid the conclusion that the same applies to associated legislation s144G (Roads Act) given its application to the most common sites of protest: roads. While it is clear that the existence of s214 has a significant chilling impact on organisations, including unions that would otherwise seek to put feet on the street in protest, it is also worth pointing to changes in the way the s214 relates to Summary Offences legislation.

Prior to the introduction of the Roads and Crimes Amendment legislation, organisations intending to march or protest on the street or hold a protest rally would make an application to NSW Police for a *Form 1 Notice of Intention to Hold a Public Assembly*. The new legislation requires prior approval from NSW Police, utilising a Form 1 application. In making that Form 1 application, the organisation intending to protest must convince the police that they will not breach the new legislation. This is a significant departure from the previous arrangement, imposing a reverse onus on those intending to protest, whereby they are regarded as being in breach of the law merely by intending to protest. Previously, those intending to protest, including unions were required to complete a *Form 1* notifying NSW Police of the intended gathering so that there could be a discussion about a safe route and other arrangements. If

the NSW Police opposed the gathering, they were required to present a case to the court. Under the new legislation, police have full discretion to deny approval and expose the intended gathering to the risk of the new penalties.

The capacity for the Minister to define almost any road, bridge, tunnel, place, or public facility under the terms of the new legislation means that planning has become fraught with difficulty for unions and other organisations that want to hold an event or protest in a public place because logistics for protests often change at short notice, making it difficult and impractical to achieve Police approval. This change to the interaction with Summary Offences legislation is therefore particularly concerning, compounding the chilling impact of s 214.

Moreover, Section 24 of the Summary Offences Act protects participants in an *authorised* public assembly. The Form 1 regime does not itself protect protest participants from being charged with seriously disrupting a major bridge, tunnel or road under s144G(1)(b) or obstructing a major facility. As the Form 1 regime is the only available way of attaining Police consent for a protest, S214 imposes a higher burden on protests to be protected than the Summary Offences Act, requiring the *consent* of the Police where the previous arrangement, under the Summary Offences Act, which required only that Police do not *oppose* the protest and that the protest be held 'substantially in accordance' with the Form 1 Notice of Intention. To the extent that it does offer protection from obstruction of a major bridge, tunnel or road, the provision suffers from 'substantial limitations in providing a means of reducing the burden on the implied freedom [of political communication]', as pointed out by Justice Walton in *Kvelde*.

The protections are only activated if the Commissioner of Police does not oppose the public assembly or a Court authorises the public assembly. ASU has gone to considerable lengths to ensure that we comply with both Form 1 requirements and the potential of the Roads and Crimes Amendment legislation. We have had constructive negotiations with NSW Police on each occasion. However, it is clear in the legislation that there is a very real opportunity for discretion for the Minister to direct NSW Police in relation to protests and therefore not all negotiations will necessarily be impartial or constructive.

A further issue that arises for many protesters, including unions is the practical reality that while a union might organise a protest gathering or march and fully intend to comply with the Form 1 and requirements of s214, it is common for people to join protests without specific and who will be unknown to the organisers. While those uninvited protesters might share the views of the union on a particular issue, clearly, they cannot be controlled, or compelled by the union organisers to comply with commitments given by the union to NSW Police (or anyone else for that matter).

Plainly, it is unacceptable that union organisers and their members could be subject to serious penalties for conduct in which they have no part. There is very onerous legislation specifically impacting union officials which requires them to *be of good character* in order to hold a Right of Entry under federal industrial law and state workplace health and safety legislation. The potential to fall foul of legislation that carries with it the potential for prison and heavy fines despite taking every possible precaution to comply with the legislation is therefore a real threat in these circumstances. This has particularly serious implications for protests that might face counter-protestors or agitators who could join a march posing as participants and then undertake actions contrary to the Notice of Intention, thus exposing all protest-goers to the risk of being in breach of s144G and/or s214.

At the same time, unions would be the first organisations to say that we encourage people who are not yet union members, to recognise the power and joy of collective action and spontaneously join a union event, including a protest rally. In these circumstances, it is clearly an unacceptable burden for those new union members and supporters to have to know the

conditions in the Notice of Intention so as to be able to comply with them sufficiently to protect themselves from the serious penalties of s144G and particularly those of s 214. Freedom of assembly must include the freedom to spontaneously join a protest and to arrive at a protest without having first consulted the exact conditions under which it is being held.

The Court found that Section 214A had a legitimate purpose: to increase deterrents to unlawful conduct causing damage, serious disruption or obstruction to major facilities and, more generally, to the broader community. The legitimate purpose of section 214A, however, did not extend to the criminalisation of otherwise lawful conduct that 'merely' caused inconvenience. s144G was brought into place in 2018 following an incident where a member of the public climbed on the Bridge, causing traffic to be stopped. The purpose of the legislation was to prevent conduct causing serious disruption or obstruction on the Sydney Harbour Bridge. This purpose was extended by the 2022 amendments to include preventing serious disruption or obstruction on major bridges, tunnels and roads. Following the reasoning in *Kvelde*, the provisions in s144G(2) cannot be said to form part of this legitimate purpose. The court considered that s 144G and s 214A have a 'chilling effect' on political communication expressed in protests and that it was possible for alternative laws to have imposed a significantly lesser burden on the implied freedom and still have achieved Parliament's legitimate purpose.

Policy objective: Protect the capacity for the community to engage in protests concerning industrial action, industrial disputes and industrial campaigns

Schedule 2 Part 4AF Major facilities

214A Damage or disruption to major facility

(1) A person must not enter, remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct—

(a) causes damage to the major facility, or

(b) seriously disrupts or obstructs persons attempting to use the major facility, or

(c) causes the major facility, or part of the major facility, to be closed, or

(d) causes persons attempting to use the major facility to be redirected. Maximum penalty—200 penalty units or imprisonment for 2 years, or both.

(3) A person does not commit an offence under this section if the conduct forms part of industrial action.

The Act amends the *Roads Act 1993* (NSW) and the *Crimes Act 1900* (NSW) in order to increase penalties to a maximum of 2 years imprisonment and \$22,000 in fines, or both, for those who engage in peaceful protest in contravention of it. The Act contains certain exemptions from these laws for:

- industrial action
- an industrial dispute
- an industrial campaign

At the time the legalisation was being debated the (then) Government, (then) Opposition and mainstream media promoted a narrative that unions had been *carved out* of the new legislation.

These so-called ‘carve out’ provisions are contained in s.214A (3) of the *Crimes Act 1900* and s.144G (5A) of the *Roads Act 1993*. A further relevant *carve out* provision is provided pursuant to s.214A (4) of the *Crimes Act 1900* for employees at their workplace.

Despite the purported protection for the above activity, these terms are not defined in the Act and raise a number of questions about the adequacy of the legislation in protecting union members, their families and their supporters from criminal charges for the activities that unions often undertake in practice, including campaigns for social change rather than for strictly industrial matters.

The issue of definition

Industrial action, *industrial dispute* and *industrial campaign* have broad meaning. Their meanings are not unlimited. Nor are they clear. There are a multitude of overlapping statutory and common law definitions of these terms. For example, the term ‘industrial action’ is not defined in the legislation and is a fairly subjective term. If the term refers only to ‘*protected action*’, then most union members will work their entire lives and never be involved in ‘protected action’. Even if the term is used more generally, as defining industrial action that may not be ‘protected’ but is nonetheless a protest in relation to an industrial issue, such as wages, or conditions, most union members will not ever be involved in any form of protest action on the streets in relation to those issues. However, most union members will at some time in their working life be involved in a protest instigated or supported by their union in relation to an issue that is not linked to ‘industrial action’ under any definition. For example, ASU members and members of other unions are very likely to be involved in protests about forced adoptions impacting First Nations People, the annual Climate Strikes, in support of the establishment and better funding of the NDIS, paid family violence leave, rights for refugees, and against racism and homelessness, Closing the Gap, local procurement, better workers compensation laws, fair trade, and so on.

Because of the subjectivity of the definitions used in the legislation, the law is apt to discriminate based on the content of political communications: private ports and infrastructure facilities seem to have been selected as sites targeted by climate change activists; train stations entrances and roads (as well as bridges or tunnels connected to roads) are frequent sites of political protests for a multitude of causes, whether static rallies or dynamic marches along roads and commonly starting or ending at public transport venues; and both prohibitions are subject to a defence for ‘industrial’, but not other campaigns.

Even if this purported exclusion of union members from the operation of the legislation was held to be the case, union members would not accept that they should be the only people not impacted by this very bad legislation. Union members are committed to equality and equity before the law and would not accept that others who protest should feel the full brunt of this targeted and punitive legislation while they are seen to be exempt.

The issue of ‘consorting’

It is not clear whether ‘industrial action’ only relates to action taken by an individual in relation to their own workplace industrial action. For example, if a workplace has ‘protected’ industrial [protest] action in relation to an issue at that workplace, but other union members join that protest action, would those other union members from other workplaces, which are not part of the protected action be subject to the new laws? [consorting]

The issue of 'incitement'

- a) If a union official informs or encourages union members from a workplace that is not engaged in protected action, to join a protest at a site where there is protected action, would that union official be subject to the new laws [incitement]?
- b) If a union official informs or encourages union members from a workplace that is not engaged in protected action, to join a protest at a site where there is not protected action, would that union official be subject to the new laws [incitement]?

Protected action

If a workplace engages in any protest action about an issue that is directly related to their workplace, but is not 'protected action', will those workers – and any other workers who join them – be subject to the new laws?

The issue of location

If workers from one or a variety of unions protest at a central place, that is not their workplace, such as parliament house, in relation to an industrial issue that is not specific to their workplace, for example, protest against new workers comp laws are they subject to the new laws?

The nature of the protest

- a) If workers from one or a variety of unions protest at their own workplace in relation to an industrial issue that is not specific to their workplace, – for example, protest against new workers comp laws, are they subject to the new laws?
- b) If workers from one or a variety of unions protest at their own workplace in relation to an issue that is not an industrial issue, but is specific to their workplace, for example, protesting against racism, *homophobia*, or *discrimination*, or *bullying in their workplace*, are they subject to the new laws?

People involved in the protest

Are family members, friends or supporters who act in support of union members by engaging in otherwise unlawful activity under the Act protected by the carve out provisions? For example, family members, friends and others, including children who join a picket line in support of union members as occurred in the *1998 Patricks Maritime Dispute*.

Will unions be required to obtain permission from the NSW Police Force or an alternative pursuant to s.214A (6) of the *Crimes Act 1900* in order to ensure that people not directly engaged in industrial action, an industrial dispute or an industrial campaign themselves, are protected from being charged under the provisions of the Act?

Effect of termination of the employment relationship during protests

Does the protection provided by the carve out provisions, particularly the protection for employees at their workplace under s.214A (4) of the *Crimes Act 1900*, cease if the employment relationship is terminated? For example, a union member engages in unlawful industrial action at a *Major Facility* and then their employment is terminated by their employer, but they continue to engage in activity that is otherwise unlawful under the Act.

Summary

These are all very practical examples of situations in which most union secretaries have been involved in the past and more recently and make clear that the purported *carve out* for unions is at best unreliable and ineffective and at worst, leaves union officials, members, and their supporters at significant risk. While union officials and union members would not seek to be privileged over other members of the community by being *carved out* of this obnoxious legislation, it is clear that unions are themselves very specifically at risk from this legislation, particularly when considered in the context of other anti-union legislation introduced by former

state governments, such as the Perrottet Government. We would certainly hope that this legislation will be rescinded by the current government and never reinstated. However, unions are very pragmatic and are alive to the need for constant vigilance against the worst excesses of future Coalition and other radical anti-union state governments.

The judgement in Kvelde also affirms the need for careful consideration and proper consultation regarding the introduction of any legislation affecting the right to protest. The urgent manner in which the 2022 amendments were brought forward, and the lack of review afforded to them directly contributed to the improper over-reach of s214A(1)(c) and (d).

Legislative decision-making must be guided by a regard for fundamental rights and take place with the involvement of the community.

Recommendations

1. Crimes Act s214A should be repealed.
2. Barring repeal of the entire section, s214(1)(c) and (d) should be repealed.
3. A review should be carried out into introducing a Human Rights Act for NSW to ensure the right to protest is protected.
4. A review should be undertaken of the Summary Offences Act protections for protest and whether their operation facilitates the exercise of the right to protest.