

FIRST PRINT

**RIVERS AND FORESHORES IMPROVEMENT
(AMENDMENT) BILL 1991**

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to expand the current provisions of the Rivers and Foreshores Improvement Act 1948 that impose controls on the carrying out of certain activities that have or might have a detrimental effect on rivers and land adjacent to rivers.

The current controls are contained in section 23A of the Act and broadly provide for the following:

- a permit is required to be obtained before the activity is undertaken (permits are granted by the "Constructing Authority", i.e. the Public Works Department, the Water Administration Ministerial Corporation or the Maritime Services Board)
- a Constructing Authority can direct that remedial work be carried out in certain circumstances (including where an activity that requires a permit is carried out without a permit)
- the Constructing Authority can carry out any such remedial work and recover its costs.

The Bill will replace section 23A with a new Part 3A.

Under the new Part:

- a permit will be required for any activity that obstructs or detrimentally affects the flow of a river or which is likely to do so (this will be in addition to the existing requirements for a permit when excavating or removing soil in or adjacent to a river)
- the current provisions concerning remedial work will be extended to this broader range of activities
- the definition of "river" will be extended to include river lakes and coastal lakes and lagoons and is replaced for the purposes of the new Part with the concept of "protected waters"

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- provision is inserted to enable the Constructing Authority to issue a "stop order" to prevent the carrying out or continuance of an activity in contravention of the requirements for a permit and a penalty is imposed for contravening a stop order
- provision is inserted to enable the Constructing Authority to apply to the Land and Environment Court for an injunction in respect of a contravention or threatened contravention of the requirements for a permit
- the Constructing Authority will be empowered to issue an "impounding order" in respect of material removed in contravention of the new Part and plant and equipment used in the contravention, and a court that convicts a person for the contravention will be empowered to order forfeiture of the material, plant or equipment
- the exemption from the current controls that is conferred on the holders of certain entitlements under the Water Act 1912 will be removed
- the Constructing Authority will be empowered to require a person to furnish information, produce documents or answer questions concerning a possible offence under the new Part
- the existing power of entry conferred on the Constructing Authority is re-enacted with safeguards
- provision is inserted to empower an owner of land to enter his or her land, without the permission of the occupier, to carry out remedial work ordered under the new Part
- there is provision for appeals to the Land and Environment Court in respect of decisions of a Constructing Authority under the new Part
- penalties for the principal offences under the new Part will be in line with the penalties imposed under the Environmental Offences and Penalties Act 1989 for tier 2 offences under that Act (for corporations the maximum penalty is \$125,000 and \$60,000 daily penalty and for individuals the maximum penalty is \$60,000 and \$30,000 daily penalty).

Penalties of above \$5,000 for individuals or above \$10,000 for corporations will be able to be recovered only in the Land and Environment Court.

The Bill also makes consequential amendments to the Land and Environment Court Act 1979.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 gives effect to the Schedule of amendments to the Rivers and Foreshores Improvement Act 1948 (Schedule 1).

Clause 4 gives effect to the Schedule of amendments to the Land and Environment Court Act 1979 (Schedule 2).

Schedule 1 contains the amendments to the Rivers and Foreshores Improvement Act 1948 described above.

Schedule 2 contains consequential amendments to the Land and Environment Court Act 1979.

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TABLE OF PROVISIONS

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SCHEDULE 1—AMENDMENT OF RIVERS AND FORESHORES IMPROVEMENT ACT 1948

SCHEDULE 2—AMENDMENT OF LAND AND ENVIRONMENT COURT ACT 1979

**RIVERS AND FORESHORES IMPROVEMENT
(AMENDMENT) BILL 1991**

NEW SOUTH WALES



No. . . , 1991

A BILL FOR

An Act to amend the Rivers and Foreshores Improvement Act 1948 to make further provision with respect to the control of operations which adversely affect the flow of rivers and certain other waters; and for related purposes.

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The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Rivers and Foreshores Improvement (Amendment) Act 1991.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Rivers and Foreshores Improvement Act 1948 No. 20

3. The Rivers and Foreshores Improvement Act 1948 is amended as set out in Schedule 1.

Amendment of Land and Environment Court Act 1979 No. 204

4. The Land and Environment Court Act 1979 is amended as set out in Schedule 2.

**SCHEDULE 1—AMENDMENT OF RIVERS AND
FORESHORES IMPROVEMENT ACT 1948**

(Sec. 3)

(1) Part 3A:

After Part 3, insert:

**PART 3A—PROTECTION OF RIVERS
AND LAKES**

Definitions

22A. In this Part:

“**Constructing Authority**”, when used in connection with protected waters or land under or adjacent to protected waters, means:

- (a) if the bed of the waters is vested in the Maritime Services Board of New South Wales—that Board; or
- (b) if the waters are tidal and paragraph (a) does not apply—the Minister for Public Works; or
- (c) in any other case—the Ministerial Corporation;

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“**make an excavation**” includes cause or allow an excavation to be made;

“**material**” means any part of the surface of any land or any matter lying beneath that surface;

“**permit**” means a permit in force under this Part;

“**protected land**” means:

- (a) land that is the bank, shore or bed of protected waters; or
- (b) land that is not more than 40 metres from the top of the bank or shore of protected waters (measured horizontally from the top of the bank or shore); or
- (c) material at any time deposited, naturally or otherwise and whether or not in layers, on or under land referred to in paragraph (a) or (b);

“**protected waters**” means a river, lake into or from which a river flows, coastal lake or lagoon (including any permanent or temporary channel between a coastal lake or lagoon and the sea);

“**remove material**” includes cause or allow material to be removed.

Permit required for excavation etc.

22B. (1) A person must not:

- (a) make an excavation on, in or under protected land; or
- (b) remove material from protected land; or
- (c) do anything which obstructs, or detrimentally affects, the flow of protected waters, or which is likely to do so,

unless the person is either authorised to do so by a permit under this Part and does so in accordance with any conditions to which the permit is subject, or is authorised to do so by the regulations.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable:

- (a) in the case of a corporation—to a penalty not exceeding 1,250 penalty units and, in the case of a

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continuing offence, to a further penalty not exceeding 600 penalty units for each day the offence continues; or

- (b) in the case of an individual—to a penalty not exceeding 600 penalty units and, in the case of a continuing offence, to a further penalty not exceeding 300 penalty units for each day the offence continues.

(3) It is a defence to any proceedings against a person in respect of a contravention of subsection (1) for the person to establish:

- (a) that the commission of the offence was due to causes over which the person had no control and that the person took reasonable precautions and exercised due diligence to prevent the commission of the offence; or
- (b) in the case of proceedings for a contravention of subsection (1) (c), that the person could not reasonably have foreseen that the person's actions would result in, or in the likelihood of, the obstruction or detrimental effect concerned.

Grant etc. of permit

22C. (1) Application for a permit is:

- (a) to be made to the Constructing Authority in the form approved by the Authority; and
- (b) to be accompanied by the fee determined by the Authority.

(2) As a pre-condition to the grant of a permit, the Constructing Authority may require the applicant to give security for the due performance of the applicant's obligations under and in connection with the permit for an amount, in a form and on such terms and conditions as the Constructing Authority may require.

(3) The Constructing Authority may, after any investigation it thinks necessary, refuse a permit or grant one subject to such conditions as it thinks appropriate.

(4) The Constructing Authority may at any time by notice in writing given to the holder of a permit vary or revoke the permit or the conditions of the permit.

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Stop order

22D. (1) If the Constructing Authority is satisfied that a person is contravening, or is about to contravene, section 22B, the Constructing Authority may, by written notice given to the person, order the person not to engage in that activity.

(2) The order takes effect immediately or from a later time specified in the notice and is subject to such conditions as the Constructing Authority may specify in the order.

(3) The Constructing Authority may vary or revoke the order or the conditions of the order by further notice in writing given to the person subject to the order.

(4) An order under this section remains in force until one of the following happens:

- (a) the order is revoked by the Constructing Authority;
- (b) the period (if any) for which the order is expressed in the notice to be in force elapses;
- (c) a period of 3 months elapses (being a period that commences on the day on which the order takes effect).

(5) A person who does not comply with an order in force under this section is guilty of an offence and is liable:

- (a) in the case of a corporation—to a penalty not exceeding 1,250 penalty units and, in the case of a continuing offence, to a further penalty not exceeding 600 penalty units for each day the offence continues; or
- (b) in the case of an individual—to a penalty not exceeding 600 penalty units and, in the case of a continuing offence, to a further penalty not exceeding 300 penalty units for each day the offence continues.

Injunctions

22E. (1) On the application of the Constructing Authority, the Land and Environment Court may grant an injunction restraining a threatened or apprehended contravention, or the continuation of a contravention, of section 22B.

(2) An injunction may be granted without the Constructing Authority's being required to show a likelihood of damage.

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(3) If in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of the application.

(4) When the Constructing Authority makes an application to the Court for the grant of an injunction under this section, the Court is not to require the Authority or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.

Impounding orders—material removed from protected land

22F. (1) If the Constructing Authority is satisfied that a person has removed material from protected land in contravention of section 22B, the Constructing Authority may by notice in writing given to the person issue an impounding order in respect of either or both of the following:

- (a) the whole or a specified part of the material removed;
- (b) any specified plant or equipment used in the removal.

(2) The order takes effect immediately or from a later time specified in the notice and is subject to such conditions as the Constructing Authority may specify in the order.

(3) A person issued with an impounding order must not cause, permit, suffer or allow any material, plant or equipment that is the subject of the order to be used, moved, sold, disposed of or otherwise dealt with, except as permitted by the order.

Maximum penalty: 100 penalty units.

(4) The Constructing Authority may vary or revoke an impounding order or the conditions of an impounding order by further notice in writing given to the person concerned.

(5) An impounding order remains in force until one of the following happens:

- (a) the order is revoked by the Constructing Authority;
- (b) a period of 12 months elapses after the order is first issued without proceedings having been commenced within that period for an offence under section 22B in respect of the removal from protected land of the material concerned;

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(c) proceedings for such an offence are commenced within that period and have been finally dealt with (whether before or after the end of that period).

(6) If a person issued with an impounding order is convicted of an offence under this Part in respect of the removal of material, the court before which the person is convicted may, on the application of the Constructing Authority, make either or both of the following orders:

(a) an order that any material with which the proceedings are concerned and which is the subject of the impounding order be forfeited to the Crown;

(b) an order that any plant or equipment used in the removal of that material and which is the subject of the impounding order be forfeited to the Crown.

(7) Material, plant or equipment ordered to be forfeited to the Crown under this section is to be disposed of or otherwise dealt with by the Constructing Authority as the Minister directs. Any proceeds of disposal are to be applied towards the costs incurred by the Constructing Authority in carrying out work under section 22G in respect of the protected land from which the material concerned was removed.

Directions for remedial work

22G. (1) If the Constructing Authority is satisfied:

(a) that an excavation has been made on, in or under protected land or any material has been removed from protected land in contravention of section 22B; or

(b) that any excavation on, in or under any land (other than protected land) or the removal of material from any land (other than protected land) has damaged or detrimentally affected or is likely to damage or detrimentally affect protected land or is likely to cause, whether directly or indirectly, protected waters to change their course,

the Constructing Authority may, by notice in writing, direct any one or more of the appropriate persons to carry out specified work in a specified manner and within a specified time.

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(2) Any one or more of the following types of work may be directed to be carried out by a notice under subsection (1):

- (a) work to repair any damage caused to protected land by the excavation or the removal of material;
- (b) work to ensure that protected land will not be damaged or detrimentally affected, or further damaged or detrimentally affected, by the excavation or the removal of material;
- (c) work to correct any change caused, whether directly or indirectly, to the course of protected waters by the excavation or the removal of material;
- (d) work to ensure that protected waters will not, whether directly or indirectly, be caused or further caused to change their course by reason of the excavation or the removal of material;
- (e) if protected waters have changed, or are likely to change, their course by reason of the excavation or the removal of material and the Constructing Authority has determined that in the circumstances it would be expedient to change the course of the protected waters—work to ensure that the protected waters follow a course as determined by the Constructing Authority.

(3) If something has been done on land that the Constructing Authority is satisfied has obstructed or detrimentally affected the flow of protected waters, or that is likely to do so, the Constructing Authority may, by notice in writing, direct any one or more of the appropriate persons to carry out specified work in a specified manner and within a specified time.

(4) In this section, “**appropriate persons**” means the person who is the owner of the land, the person who is the occupier of the land and the person who has made the excavation or removed the material concerned or done the thing concerned.

(5) If a person fails to comply with a direction under this section, the Constructing Authority may authorise any other person to enter the land and carry out the specified work.

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(6) The Constructing Authority may recover the cost of that work from the person given the direction in any court of competent jurisdiction as a debt due by that person to the Constructing Authority.

(7) Until repayment, the cost is to be a charge on the land.

Application of Part to certain persons

22H. (1) Except as provided by this section, this Part does not apply to or in respect of the exercise of any rights lawfully exercisable:

(a) under any lease, licence, permit or other right in force under any Act relating to mining or under the Crown Lands Act 1989 or Crown Lands (Continued Tenures) Act 1989; or

(b) by any public or local authority.

(2) If the Constructing Authority is satisfied that an excavation made on, in or under any land, or the removal of material from any land, in the exercise of any of the rights referred to in subsection (1):

(a) has damaged or detrimentally affected or is likely to damage or detrimentally affect protected land; or

(b) has caused or is likely to cause, whether directly or indirectly, protected waters to change their course,

the Constructing Authority may, by notice in writing, direct the person by whom or on whose behalf the excavation has been made or the material has been removed to carry out specified work (being any or all of the types of work referred to in section 22G (2)) in a specified manner and within a specified time.

(3) Furthermore, if the Constructing Authority is satisfied that something has been done in the exercise of any of those rights that has obstructed or detrimentally affected the flow of protected waters or that is likely to do so, the Constructing Authority may, by notice in writing, direct the person by whom or on whose behalf the thing was done to carry out specified work in a specified manner and within a specified time.

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(4) If a person fails to comply with a direction under this section, the Constructing Authority may authorise any other person to enter the land and to carry out the specified work.

(5) The Constructing Authority may recover the cost of that work from the person given the direction in any court of competent jurisdiction as a debt due by that person to the Constructing Authority.

Power to obtain information

22I. (1) In this section:

“**authorised officer**” means a person authorised in writing by the Constructing Authority for the purposes of this section;

“**relevant information**” means information about a possible offence under this Part.

(2) The Constructing Authority may, by notice in writing served on a person, require the person:

(a) to give to an authorised officer, orally or in writing signed by the person (or, if the person is a body corporate, statutory body, council or other non-natural person, by a competent officer of the person) and within the time and in the manner specified in the notice, any relevant information of which the person has knowledge; or

(b) to produce to an authorised officer, in accordance with the notice, any document containing relevant information.

(3) An authorised officer may inspect a document produced in response to such a notice and may make copies of, or take extracts or notes from, the document.

(4) A person must not:

(a) fail to comply with such a notice to the extent that the person is capable of complying with it; or

(b) in purported compliance with such a notice, give information or an answer to a question, or produce a document, knowing that it is false or misleading in a material particular.

Maximum penalty: 10 penalty units.

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(5) A person is not excused from giving information, answering questions or producing documents under this section on the ground that the information, answers or documents may tend to incriminate the person.

(6) Any information or document obtained from a person under this section is not admissible against the person in criminal proceedings other than proceedings for an offence under this section.

(7) An authorised officer exercising any power under this section must, if requested to do so, produce his or her certificate of authorisation to a person served with a notice under this section.

Powers of entry authorised by Constructing Authority

22J. (1) For the purposes of this Part, a person authorised by the Constructing Authority for the purposes of this section may enter upon and inspect any land.

(2) The power conferred by subsection (1) may not be exercised unless the person proposing to exercise the power:

- (a) is in possession of a certificate of authority issued to the person by the Constructing Authority; and
- (b) gives reasonable notice to the occupier of the land of intention to exercise the power, unless the giving of notice would defeat the purpose for which it is intended to exercise the power; and
- (c) exercises the power at a reasonable time, unless it is being exercised in an emergency; and
- (d) produces the certificate of authority if required to do so by the occupier of the land; and
- (e) uses no more force than is reasonably necessary to effect the entry.

(3) A certificate of authority must:

- (a) state that it is issued under the Rivers and Foreshores Improvement Act 1948; and
- (b) give the name of the person to whom it is issued; and
- (c) describe the nature of the powers conferred and the source of the powers; and

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- (d) state the date, if any, on which it expires; and
- (e) describe the kind of land to which the power extends.

(4) If unauthorised damage is caused to property of the owner or occupier by a person exercising a power under this section to enter land, a reasonable amount of compensation is recoverable as a debt owed by the employer of the person to the person whose property was damaged unless the occupier obstructed the exercise of the power.

(5) Nothing in this section authorises a person to enter any part of premises that is used for residential purposes, except with the consent of the occupier of that part.

Owner may enter occupied land to comply with direction

22K. (1) An owner of land who does not occupy the land, or another person with the written authority of such an owner, may:

- (a) at any reasonable time, enter the land for the purpose of complying with a direction of the Constructing Authority requiring the owner to do anything on the land; and
- (b) do on the land anything necessary to enable the owner to comply with the direction.

(2) The powers conferred by this section may be exercised only:

- (a) by agreement with the occupier; or
- (b) if the occupier does not agree or a reasonable attempt by the owner or authorised person to confer with the occupier has failed—after reasonable notice of intention to exercise the power has been served on the occupier.

(3) An exercise of a power conferred by this section is not a breach of a covenant entitling the occupier to quiet enjoyment of possession of the land.

Appeal to Land and Environment Court

22L. (1) A person aggrieved by a decision of the Constructing Authority under this Part may appeal against the decision to the Land and Environment Court in accordance with rules of court.

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(2) The lodging of an appeal does not, except to the extent that the Land and Environment Court otherwise directs in relation to the appeal, operate to stay action on the decision appealed against.

(2) Section 23A (**Removal of soil from or in proximity to rivers**):
Omit the section.

(3) Sections 26–28, Schedule 1:

Omit section 26, insert instead:

Proceedings and penalties for offences

26. (1) Proceedings for an offence under this Act or the regulations are to be disposed of summarily:

- (a) by a Local Court constituted by a Magistrate sitting alone; or
- (b) by the Land and Environment Court.

(2) The maximum penalty that may be imposed by a Local Court in proceedings for an offence under this Act or the regulations is the maximum penalty (if any) specifically provided for in relation to that offence, or:

- (a) 100 penalty units (including any daily penalty) for an offence committed by a corporation; or
- (b) 50 penalty units (including any daily penalty) in any other case,

whichever is the lesser.

(3) Proceedings for an offence under this Act or the regulations may be commenced up to but not later than 12 months after the act or omission alleged to constitute the offence.

Service of documents

27. (1) A document required or permitted by this Act to be served on a person, whether the expression “serve”, “give” or “send” or any other expression is used, may be served:

- (a) on a Constructing Authority (as defined in Part 3A) by leaving it at, or sending it by post to, an office of the Authority; or

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- (b) on a natural person by delivering it to the person personally or by leaving it at, or sending it by post to, the address of the place of residence or business of the person last known to the person serving the document; or
- (c) in any other case by leaving it at, or sending it by post to, the head office, a registered office or a principal office of the person.

(2) Nothing in this section affects the operation of any law or of the rules of a court authorising a document to be served in any other manner.

Savings and transitional provisions

28. Schedule 1 has effect.

**SCHEDULE 1—SAVINGS AND TRANSITIONAL
PROVISIONS**

(Sec. 28)

*Provisions consequent on the enactment of the Rivers and
Foreshores Improvement (Amendment) Act 1991*

General saving

1. Anything done under or for the purposes of a provision of section 23A before its repeal is, after its repeal, to be considered to have been done under or for the purposes of the corresponding provision of Part 3A.

Directions for remedial work—application to prior contraventions

2. (1) A reference in section 22G to something done in contravention of section 22B includes a reference to something done in contravention of section 23A before the commencement of section 22B.

(2) Section 22H (2) applies to things done before the commencement of that section as well as to things done after that commencement.

Costs charged on land

3. A charge on land arising under section 23A and in force immediately before the repeal of that section is to be considered to be a charge arising under the corresponding provision of Part 3A.

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**SCHEDULE 2—AMENDMENT OF LAND AND
ENVIRONMENT COURT ACT 1979**

(Sec. 4)

- (1) **Section 17 (Class 1—environmental planning and protection appeals):**
After section 17 (ca), insert:
(cb) appeals and determinations under sections 6 and 22L of the Rivers and Foreshores Improvement Act 1948;
- (2) **Section 20 (Class 4—environmental planning and protection civil enforcement):**
(a) After section 20 (1) (ci), insert:
(cj) proceedings under section 22E of the Rivers and Foreshores Improvement Act 1948;
(b) In section 20 (3) (a), insert in alphabetical order of Acts “Rivers and Foreshores Improvement Act 1948;”.
- (3) **Section 21 (Class 5—environmental planning and protection summary enforcement):**
After section 21 (g), insert:
(ga) proceedings under section 26 of the Rivers and Foreshores Improvement Act 1948;
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