

21/01/2023

Statutory Review of Coal Mine Subsidence Compensation Act 2017
Policy & Strategy, Better Regulation Division
NSW Department of Customer Service

By email: subsidencecompstatreview@customerservice.nsw.gov.au

RE: Review of the Coal Mine Subsidence Compensation Act 2017.

I live in a mine subsidence area in the town of Douglas Park within the Wollondilly LGA. I'm an active advocate for our community on a range of issues related to longwall coal mining throughout the shire. Mine subsidence destroys people's homes so is one of the most significant issues affecting residents.

I sit as a Community Representative on the South 32 Appin Mine Community Consultative Committee; however, this submission is made entirely in my personal capacity.

I was shocked to learn that much of the assessment and determination of claims is performed by the Mine Proprietor. These billion-dollar multi-national mining companies plan, predict and then deliberately damage and destroy people's homes. The Act and the "Approved Procedure" appoints these same mining companies as the "determining authority" for all mine subsidence damage claims. This has to change. Currently claims must be appealed to the Land and Environment Court before they are assessed fairly.

We are talking about Australian's homes, their primary asset and the centre of their lives and aspirations. The legislation as it stands gives all the power to the Mine Proprietors. No individual landowners have the capacity to compete with such corporations.

It is a central role of government to balance such inequities, particularly when individual's homes are deliberately under threat in the pursuit of increased profits. Remember the longwall mining system that is the cause of subsidence was developed to improve profits for mining companies. There are other mining systems that avoid mine subsidence at increased cost.

Currently the cost to extract the coal, a public asset, is estimated at around \$100 per metric ton maybe up to \$150. Prices paid for coal are at all times high, above \$500 per metric ton – massive profits. There is nothing wrong with maximising profits, but it must not be at the expense of others.

This must change.

There must be a presumption that damage in an area within or close to mining was caused by the mine. The mine must prove otherwise beyond reasonable doubt for a claim to be refused.

Compensation (which routinely takes up to 5 years) covers replacement only of what the mining company deliberately destroyed. It does not take account of time, pain, suffering and other factors. If any other entity deliberately planned to destroy your home and then went ahead and did so it would be a crime. For mine subsidence it is the reverse.

When planning improvements in mine subsidence areas, homeowners must pay extra to build to compulsory "guidelines" after approval from Subsidence Advisory. Why would such charges be levied on homeowners? The savings all go to the Mine Proprietors who will pay less compensation due to lower value of mine subsidence claims.

Currently mine subsidence districts do not reflect mining leases and exploration licence areas. This leads to perverse outcomes for those in overlapping areas. There are further injustices when new exploration licences or mining leases are issued as no formal process for government to inform landowners of the significant consequences of mine subsidence are provided, rather mine proprietors are tasked to provide information which is really a marketing style campaign.

These are just some of the many issues. My submission that follows builds on these matters and recommends a number of changes to the Act.

I look forward to and welcome further consultation as the review progresses.

Regards

Sam Davis

Submission

Although this is a review of the Act, both the Regulation and the Approved Procedure are relevant, particularly when critical matters that should be for Parliament to determine are concerned.

The relevant documents referenced in my submission:

- The Coal Mine Subsidence Compensation Act 2017 (Act) is here - <https://legislation.nsw.gov.au/view/html/inforce/current/act-2017-037>
- The Coal Mine Subsidence Compensation Regulation 2017 (Regulation) is here - <https://legislation.nsw.gov.au/view/html/inforce/current/sl-2017-0686>
- The only current “Approved Procedure” under Section 15 of the Act we can identify is here - <https://www.nsw.gov.au/sites/default/files/2022-01/mine-subsidence-compensation-claims-process-guidelines-subsidence-advisory-nsw.pdf>

The following should be read alongside the Act.

3 Objects of the Act

The objects address compensation for damage caused by subsidence but do not address compensation for time, pain and suffering.

The objects neglect compensation costs required to plan, build and maintain improvements to the standards required by Subsidence Advisory to protect against or mitigate the likely effects of subsidence.

6 Compensation for mine subsidence

Persons should be compensated for costs incurred to mitigate against subsidence. Consider rewriting this section to read “A person is entitled to compensation in relation to mitigation of subsidence and actual subsidence in accordance with this Act.

Costs to mitigate against mine subsidence should be paid by the mine proprietor or the mining lease or exploration licence holder as these are the entities that will save money when mining operation take place.

7 Types of compensation

In (1)(b) compensation should extend to time, pain and suffering.

In (2)(a) reword as follows – “[A person is entitled to] compensation for preventative or mitigative expenses, including as required for Subsidence Advisory approval when planning and constructing improvements.” and similarly for (2)(b).

8 Liability for compensation

Edit (1)(a) to including compensation for preventative and mitigative expenses as required by Subsidence Advisory.

9 Limitation on claims for damage arising out of subsidence

Section 9(1) is an example where the mine proprietor must assess the risk of mining in an area against the likely costs to compensate owners.

Consider deleting (1) completely.

The improvement, regardless of its condition must be restored. An old farm shed is still a functional shed and if destroyed by subsidence then it must be replaced with a new shed that is able to perform the same function, for example.

10 Limitation of claims arising out of action to prevent or mitigate damage

(1)(d) states compensation is payable for preventative or mitigating work. Currently work completed for this purpose to comply with Subsidence Advisory approval conditions cannot be claimed – this needs to be changed and specifically specified in the Act (within Part 3).

In (2) the claim must consider more than a financial comparison of preventative against repair/replacement. It should also consider historical, cultural and emotional factors.

A large profit making entity is deliberately and knowingly damaging an Australian's home or other major asset. The nature of how the damage is prevented, repaired or replaced is a decision for the home owner to decide with reasonable oversight by the state.

The mine proprietor should have no role in such a determination. The mine proprietor simply funds the work.

12 Forwarding of claims relating to active coal mines to mine proprietors

The Chief Executive must presume that damage in an area within or close to mining and within a reasonable time frame was caused by the mine. How close is difficult to determine as is the time frame after mining.

One thing is certain, the land will eventually subside to fill the entire volume of material removed by the longwall operation. This may take many years and the effects on the surface are impossible to predict with certainty. The benefit of the doubt must therefore rest in favour of the land owner not the mine proprietor, as is currently the case.

Currently rules of thumb, such as a 35-degree angle of draw, are being used routinely to reject claims. Although most subsidence statistically does indeed occur within this 35-degree area, not all does. I am aware of numerous examples whereby subsidence distant from workings has occurred, particularly where valleys, rivers, cliff lines and other features are interacting with the subsidence forces. The law must not exclude such claims.

I am also aware that claims are forwarded by Subsidence Advisory to the mine proprietor who determines if the claim is in an active area. In reality Subsidence Advisory is doing the bidding of the mine proprietor, which is understandable given they must determine under Section 12(1)(a) if the claim is in an active coal mine area, so they ask the mine proprietor.

To resolve the issue all subsidence claims within the general vicinity and within a few years of mining should be progressed. The mine proprietor must prove that damage was not caused by mine subsidence. Extensive reworking of Section 12(1)(a) is required to specify the detail of how the active mine area is determined.

This landowner (claimant) must be provided equal rights to the mine proprietor when the Chief Executive's determination under S.12(1)(a) is reviewed. Specifically the claimant (or their representative) must be included in deliberations and consulted as part of the Secretary's review under (2). Currently all power to argue the case is with the mine proprietor.

In (4) the Secretary must be required to consult with the claimant during and as an integral part of their deliberations.

Section 12(7) is totally inappropriate. The mine proprietor should have no role in determining the claim for compensation and this should be explicitly stated.

14 Approved procedures

Section 13 specifies that claims must be determined in accordance with the approved procedures.

Currently there is one set of approved procedures titled "Guidelines - Process for Claiming Mine Subsidence Compensation". This document was produced by Subsidence Advisory and to my knowledge has not been the subject of public consultation. At a minimum this "approved procedure" requires oversight by an independent panel and review including public consultation.

Is a department produced document such as the "Guidelines - Process for Claiming Mine Subsidence Compensation" the suitable method of specifying the "approved procedures"? In my view the approved procedures are better located as an appendix within the regulation where they are subjected to scrutiny of the government and parliament.

The Act should specify what the "approved procedures" MUST include rather than what they may deal with.

Section 14(3) requires detail to explain the process, including public consultation, the Chief Executive must perform to amend, revoke or replace the approved procedures. Consultation to include specific notification to all landowners within all mine subsidence districts.

Importantly the Act must specifically exclude mine proprietors from any role in determining claims, including specifying that approved procedures must exclude mine proprietors.

It is totally unacceptable that mine proprietors are involved in negotiating the nature and magnitude of compensation for damage they inflicted. There is no other area I am aware of where a business entity that knowingly and deliberately inflicted damage on an innocent party has a role in determining the nature or size of compensation.

Currently the Approved Procedures includes detail of a "Deed of Acknowledgement, Release and Indemnity" on page 23. There are numerous concerns regarding this deed, however the significant concern that should be addressed within the Act is confidentiality clauses. Such clauses continue to greatly advantage the mine proprietors to the detriment of claimants.

There are many examples whereby neighbours are unaware their neighbour has settled a claim or even has a claim due to pressure from mine employees to keep negotiations private. This restricts the ability of neighbours to share their experiences with those who are or are soon to face subsidence damage and the claim process.

The mine proprietor's only role should be to pay the determined compensation - that is it.

15 Review of claim determinations by Secretary

The ability of claimants to have the Secretary review refused claims is supported. However, currently section 15(1) states that the proprietor of the mine may have refused a claim. This is unacceptable and must be changed in the revised Act so that the mine proprietor has no role in approving or refusing claims.

16 Appeals

In section 16(2) the mine proprietor is able to appeal the Secretary's decision to the Land and Environment in the same manner as the claimant. This is not supported under the current regime.

Currently the mine proprietor determines the claim under section 12(7), therefore they have had more than adequate opportunity to have their case heard. In addition, the power of a large mining corporation in the Land and Environment court far outweighs the means of an individual claimant.

Should powers of the mine proprietor to determine claims be removed completely then their ability to appeal to the Land and Environment court may be more appropriate.

In (3), 12 months is a more reasonable time period within which an appeal must be initiated than the existing 3 months.

20 Mine subsidence districts

The boundaries of Mine Subsidence districts and their adjustment remain problematic.

Mine Subsidence Districts have a significant effect on property values so much care is required when altering boundaries.

There are anomalies between Mine Subsidence District boundaries, mining lease boundaries and exploration licence boundaries. This creates a range of issues for landowners. For instance when an exploration licence is granted it is up to the mine proprietor to consult with landowners. This consultation is routinely more like a marketing campaign with no or minimal information regarding the consequences in terms of future improvements and mine subsidence damage, let alone the effect on property value and future usage.

There are instances in our local area where mine proprietors negotiate substantial private agreements with developers such that the mine proprietor agrees to not mine under the development area. Mining leases have been relinquished as part of such agreements. The mining companies are making substantial profits by not mining in such areas. Instead they redirect their longwall operations in other directions to avoid the development where such agreements are in place.

When mining is planned or proposed for an area the department, maybe Subsidence Advisory, must be the primary notifier to all landowners, not the mine proprietor.

A review of mine subsidence districts including procedures for updating boundaries and the economic and social consequences is dearly needed. The Act should then specify the procedure for keeping boundaries up to date as new mining operations are proposed and altered.

22 Approvals for development within mine subsidence districts

All costs involved in obtaining approval and for actual construction to comply with Subsidence Advisory approval conditions should be compensated by the mine proprietor, mining lease holder or exploration licence holder. It is currently a glaring anomaly that homeowners must pay the cost of such mitigation or prevention measures that are in place to reduce the compensation the mine proprietor will be due should subsidence damage occur. This could be considered much like insurance, therefore is paid by the mine proprietor.

Recommend inserting Section 22(10) to read “All development costs associated with complying with conditions under this section are to be reimbursed by Subsidence Advisory, who in turn will claim the same from the mine proprietor or owner of the mining lease or holder of the exploration licence.”

23 Contravening development

There is no definition of “contravening development”. It is unclear if this term applies to any development that was not approved by Subsidence Advisory or more generally to all developments not approved under planning laws and regulation.

Planning laws should not affect mine subsidence claims. Claims must be to compensate the owner for all loss due to subsidence regardless of the planning approvals in place or not in place.

The value of the damage is what is being valued and compensated. Whether or not the improvement is approved or not should be irrelevant. The owner may be subject to a penalty under section 21 but to then refuse all compensation for the contravening development is unconscionable.

Recommend deletion of sections 23(1)(b) and therefore also delete 23(2).

28 Review by Secretary of certain temporary action directions

The necessity to make good damage in emergency or temporary situations should be a requirement to the granting of an authority to mine in an area. This is fundamental in all industries to ensure safety. It is a risk to the mine proprietor that on rare occasions they will be required to make good damage that in fact was not a result of their activities. When considering the overall need for emergency repairs this is a small price for such large mine concerns to accept.

If a review by the Secretary is initiated then the claimant must be notified and consulted at all stages of the review process – this is not currently the case. Consider adding (2)(d) “consult with the claimant” and (3)(C) “the claimant.”

29 Works for prevention or mitigation of damage from subsidence

All such works undertaken to be funded by the mine proprietor.

30 Vacant land whose development affected by subsidence

It is unclear under what circumstances the Chief Executive would choose to utilise the powers provided by this section. It is also unclear if the owner of the land has a say in the acquisition or works to prevent or mitigate effects of subsidence. Therefore, this section requires revision to better detail particulars.

41 Inspections

Currently pre-mining inspections are offered by most mine proprietors just prior to longwall mining commencing in the vicinity of properties and improvements. Detail of such inspections is described within the “Approved Procedure”.

I understand that copies of these inspection reports are available to the mine proprietors and in some cases the report is compiled by mine proprietor staff or contractors. This is a conflict of interest and furthermore reports produced in such a manner can only disadvantage the homeowner.

A better system is to remove the mine proprietor entirely and instead provide funds to residents directly to perform pre-mining inspections or Subsidence Advisory could provide the service directly.

43 Power to enter premises without consent

A court issued warrant which specifies the permitted detail from sections 44 to 48 must be a requirement for all entry to private land, premises or residential buildings unless consent has been specifically granted as described in section 42.

51 Regulations

All data and reports under (2)(b) to be provided or made readily available to all landowners in the vicinity of the affected area.

Additional Items

- Subsidence Advisory to be required to perform an annual review of final compensation paid to claimants. The review is to include detail of all claims with personal details redacted.
- Mining lease and exploration licence approval and assessments must include full public consultation by Subsidence Advisory with all potentially affected landowners. The consultation to include details of the mine subsidence claim system, copies of the annual review of compensation, potential effect on property value, extra build costs for improvements and future usage restrictions.
- Mining lease owners must cover all additional costs required to build within the lease area.
- In my experience roads are often damaged due to mine subsidence. Enquiries with local government indicate such damage is rarely permanently repaired at the mine proprietor’s cost. This is very different to state owned assets where damage is essentially repaired, and the mine proprietor is invoiced. For example, in our area damage to the Hume Highway and main railway line is repaired immediately and charged to the mine proprietor. Local government on the other hand, may ask the mine if they accept responsibility and rarely is compensation forthcoming.