

20/01/2023

POLICY & STRATEGY, BETTER REGULATION DIVISION

NSW Department of Customer Service

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

Dear Policy & Strategy Team,

Statutory Review of Coal Mine Subsidence Compensation Act 2017: Discussion Paper 2022

Tahmoor Coal Pty Ltd (**Tahmoor Coal**) hereby submits its comments and submissions in response to the Discussion Paper published in November 2022.

Tahmoor Coal notes that the Discussion Paper focusses on the review of the objectives of the *Coal Mine Subsidence Compensation Act 2017* (**the Act**) and that the *Coal Mine Subsidence Regulation 2017* (**the Regulation**) will be reviewed separately in 2023. Tahmoor Coal has attempted to limit its response to the Discussion Paper to comments on the Act, noting that there will be another opportunity to provide further commentary on the Regulation in 2023.

Tahmoor Coal also notes that the Discussion Paper seeks commentary on the approved procedures, but notes that a separate review of the approved procedures will be considered under section 14 of the Act following the review of the Act, and that feedback regarding the current approved procedures will be considered as part of that process and not as part of this review of the Act. Tahmoor Coal looks forward to the opportunity to provide further commentary on the approved procedures review in 2023.

Tahmoor Coal's responses to the questions for comment are as follows. Where Tahmoor Coal has no response to provide in relation to a question for comment, that question has been omitted from this document.

3. Do you think the framework for compensation is working well – (yes/no) If no, what improvements do you suggest are made to the compensation framework?

Overall, the framework for compensation is effective at meeting the objectives of the Act. However, the key features of the framework include:

1. That it is an *efficient* framework. The efficiency of the framework is questionable, as many property owners are facing long periods for determination of their claims. There are many examples that exceed the claim assessment and Secretary Review timeframes. All Secretary Reviews have exceeded the legislated timeframe and there is no governance around this process. The process defines a 3-month determination timeframe and most claims in review exceed 6-12 months pending an outcome. Suggest adherence to the legislated timeframes and transparency of KPI reporting in public forum (report at Community Consultative Committee

SIMEC Mining

2975 Remembrance Driveway, Bargo NSW 2574
PO Box 100, Tahmoor NSW 2573

T: 02 4640 0110
E: peter.vale@simecgfg.com
www.simec.com

MEMBER OF



meetings or on Subsidence Advisory website – eg. report number of claims exceeding legislated timeframes so its visible and holds Subsidence Advisory NSW accountable for regulating claim timeframes).

2. That it compensates for damage caused by subsidence resulting from coal mine operations. This is factually difficult to determine comprehensively without a pre-mining inspection of the relevant properties, to understand the baseline of the condition of the properties. It is unfair to either the claimants or the compensating party to form an assumption either that there has been no pre-mining damage or that all damage was pre-mining damage, unless proven otherwise. A simple approach for mitigating this issue and ensuring that the objective of compensating for subsidence-caused damage is to require a program of pre-mining inspections and survey installation to be undertaken, with such inspections required as a precondition to making any claim under the Act. The program of mining inspections would include demonstrated evidence by the mine proprietor that proactive consultation was conducted to explain the non-invasive PMI process and ample opportunity and time was allowed for a PMI to be conducted.

3. We recommend Section 41 be enacted by Subsidence Advisory. Section 41 permits the Chief Executive to cause inspections of premises to be carried out including inspections of premises before activities at a coal mine commence to ascertain pre-subsidence information.

5. Do you think certain types of compensation should be extended to tenants of a property?

Tahmoor Coal considers it reasonable that residential tenants should be compensated for their reasonable relocation costs if they are required to vacate their tenanted properties due to mining-caused subsidence damage or the rectification of the damage, provided there is evidence of a formal rental agreement in place.

Rental costs should not be compensated, in addition to the obligation of the party paying the compensation to pay lost rent to the landlord, as the payment of lost rent implies that the tenant has not paid rent for the relevant period, and hence the tenant has not suffered any loss in relation to rent that needs to be compensated. If there is a higher rental payable by the tenant for a new property, then that could be considered subject to limitations that the compensation for a higher rental should not be paid to the extent that the higher rental is as a result of the new accommodation not being similar in terms of size, condition and quality to the property in respect of which the damage has occurred.

In either case, there should be limitations applying to the claims, such as claims can only be made:

- until the earlier of 12 months from becoming aware of the damage, or 3 years from the end of mining of the relevant longwall.

- a “relevant longwall” is one that is within a 200m radius of the property.

7. Do you think that the current requirements for making a claim of compensation are appropriate?

There should be limitations applying to the claims, such as claims can only be made:

- until the earlier of 12 months from becoming aware of the damage, or 3 years from the end of mining of the relevant longwall

- a “relevant longwall” is one that is within a 200m radius of the property.

8. Should the Act be amended to allow the approved procedures made under section 14 to deal with additional aspects of the claims process beyond claim determination?

As discussed in question 3, the requirement for a pre-mining inspection and survey installation to be undertaken as a pre-requisite for any claim to be addressed in the approved procedures.

Section 41 should be enacted by Subsidence Advisory. Section 41 permits the Chief Executive to cause inspections of premises to be carried out including inspections of premises before activities at a coal mine commence to ascertain pre-subsidence information.

Tahmoor Coal also notes that the Discussion Paper seeks commentary on the approved procedures, but notes that a separate review of the approved procedures will be considered under section 14 of the Act following the review of the Act, and that feedback regarding the current approved procedures will be considered as part of that process and not as part of this review of the Act. Tahmoor Coals looks forward to the opportunity to provide further commentary on the approved procedures review in 2023.

To avoid uncertainty, Tahmoor Coal submits that subsection (5) of section 14 of the Act be removed, as an amendment of the approved procedures that the Chief Executive may consider to be minor or trivial in nature may, in fact, have greater consequences for proprietors of active coal mines. Any such changes to the approved procedures undertaken without consultation to proprietors of active coal mines may represent a denial of natural justice.

9. Do you think the Act should be amended to specify requirements for certain types of information from mine operators?

No. The scope of information that is provided by proprietors of active coal mines to landowners and Subsidence Advisory is considered sufficient to enable the objectives of the Act to be pursued. Proprietors of active coal mines should not be required to obtain additional information relating to the mining or subsidence that does not already exist.

10. Is the dispute resolution process achieving its aim of providing a no-cost independent review mechanism?

No. At the present time, there are legal firms offering to represent applications in secretary reviews and appeals to the Land and Environment Court (**LEC**) on a “no win, no fee” basis, but this does not generally apply to disbursement such as expert reports and counsel fees, and unnecessarily promotes the review and appeal of determinations without proper consideration of the merits of the determinations. This results in cost for applicants, as well as significant delays in achieving a compensation outcome for applicants. It also results in additional costs to Subsidence Advisory, the Secretary and the proprietors of active coal mines.

In any event, the Secretary review process requires the proprietors of active coal mines to bear the costs of that review at the discretion of the Secretary.

Tahmoor Coal concedes that legal practitioners may be required for LEC appeals, however this should not remain a “no cost” jurisdiction, so that applicants properly take into account the risks of paying costs incurred by the Secretary and the proprietors of active coal mines in participating in LEC proceedings.

Further, Tahmoor Coal submits that the Act should be amended to clarify that proprietors of active coal mines should have the rights to:

1. Seek a review of a claim determination by the Secretary under sections 15 and 16(1) of the Act (even against the determination of the proprietor of a coal mine, because such determination is made on reports that are provided to the proprietor, which the proprietor must apply, and does not have the right to challenge during the determination process); and
2. Be joined to any LEC appeal proceedings instituted by a person claiming compensation under section 16 of the Act. In *Tahmoor Coal Pty Ltd v Visser* [2022] NSWCA 35, Tahmoor Coal appealed a decision of the LEC to refuse to join Tahmoor Coal to a LEC appeal from the decision of the Secretary, which appeal was filed by the person claiming compensation. The Court of Appeal of the Supreme Court of NSW allowed Tahmoor's appeal and ordered that Tahmoor Coal be joined as a respondent to the proceeding filed by the person claiming compensation. The Court of Appeal found that Tahmoor Coal was a necessary party to the LEC appeal, due to the fact that Tahmoor Coal would have the liability to pay any judgment amount, and hence ought to have been joined to the LEC proceedings.

These amendments to the Act would clarify that natural justice is provided to proprietors of active coal mines, who are required to pay the amount of any determination by the Secretary and/or LEC, and hence should be included in reviews or appeals of determinations made or not made by the Secretary. Clarification of this position in the Act would prevent any future uncertainty and costs incurred by claimants, the Secretary and proprietors of active coal mines in taking these matters to the Court of Appeal for resolution.

11. Should contracting out of the Act be considered for government agencies such as Transport for NSW?

Tahmoor Coal does not consider it appropriate for any government agencies, or any other persons, to be entitled to contract out of the Act in relation to development matters, such as approvals to conduct developments in mine subsidence districts.

Contracting out should be considered for the following bodies in respect of claims, so that these bodies can negotiate directly with proprietors of active coal mines in relation to claims for rectifying damage caused by subsidence without going through the claims process set out in the Act:

- local, state and federal government agencies and statutory corporations
- other infrastructure companies – eg, gas, electricity, water, rail, road and telecommunications providers and distributors.

This approach would enable such companies, who have substantial abilities to represent themselves in commercial negotiations, to negotiate terms for subsidence damage with proprietors of active coal mines and have them reflected in binding agreements, thereby reducing the workload on Subsidence Advisory and reducing the pressure on the process contemplated by the Act for residential applications for compensation and other commercial enterprises affected by damage to their properties in mine subsidence districts.

In the event that the parties are unable to agree on a claim settlement, the process should default to the Act.

12. Do you have any comment about mine subsidence districts and how they work?

Tahmoor Coal is seeking stronger actions such as auditing by Subsidence Advisory to ensure constructed improvements are built in compliance with the CMSC Act and building standards.

15. Do you agree with the actions that can be taken by the Chief Executive where there is a danger to the public? Are there any improvements you can suggest?

Tahmoor Coal notes that the Chief Executive has power under section 27 to direct emergency action, urgent and temporary repairs to be carried out. There are no requirements for such directions to be based on any technical or expert opinions and, despite the proprietor of an active coal mine having a limited right of review for temporary repair directions under section 28, it is an offence for the proprietor of an active coal mine to fail to comply with a direction of the Chief Executive. This section 27 provides very broad powers with criminal liability consequences, which may be exercised without due inquiry, technical or expert evidence in support.

Tahmoor Coal acknowledges that there may be circumstances where such directions are necessary, however Tahmoor Coal submits that proprietors of active coal mines should have the opportunity to seek a review of any directions made under section 27. The Chief Executive will continue to have the right to have the necessary action or urgent or temporary repairs carried out under subsection (3) of section 27, but the automatic criminal liability under subsection (2) is unwarranted, unnecessary and represents a denial of natural justice to proprietors of active coal mines.

Similarly, the Chief Executive's right to seek recovery of the amount of the payment from the proprietor of the active coal mine should be subject to any review of the Chief Executive's direction sought under section 28.

21. Should the penalty levels be adjusted to take account of increases in Consumer Price Index since the Act's enactment in 2018?

No. The penalty levels have been determined by penalty units. The process for review of penalty units is considered to be sufficient.

24. Do you have any comments on how property owners can continue to be compensated for the cost of repairs for damage caused by coal mining subsidence in the future, given the changing environment for the coal mining industry?

This question appears to be addressing the prospect for lesser amounts of net contributions to the Fund as coal mine companies reduce their operations over time. Tahmoor Coal submits that, to require the remaining proprietors of active coal mines to increase their contributions to the Fund, does not provide a fair and equitable resolution to this issue, as those remaining proprietors will effectively be underwriting subsidence damage liability for the mining areas of the exiting/reducing proprietors, whilst still remaining principally liable for subsidence damage liability in their own mining areas.

Kind Regards

Zina Ainsworth
Manager Environment and Community
Tahmoor Coal Pty Ltd, SIMEC