



New South Wales

Mine Subsidence Compensation Amendment Bill 2014

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to make amendments to the *Mine Subsidence Compensation Act 1961* (the *Principal Act*) as follows:

- (a) to provide that the Mine Subsidence Board (the *Board*) is not to pay out a claim for compensation from the Mine Subsidence Compensation Fund (the *Fund*) relating to preventative or mitigative expenses incurred or proposed before the relevant subsidence occurs,
- (b) to provide that the Board may reject a claim for compensation for preventative or mitigative expenses if the Board is of the opinion it is disproportionate to the expense of repairing or replacing the improvements or household or other effects concerned,
- (c) to make it clear that the Board must notify claimants of its decisions relating to claims for compensation and the reasons for those decisions,
- (d) to clarify the operation of provisions relating to Board approvals and certificates of compliance,
- (e) to make savings and transitional amendments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Mine Subsidence Compensation Act 1961 No 22

Amendments relating to claims for preventative or mitigative expenses incurred or proposed before subsidence occurs

The Compensation Scheme

The Principal Act establishes a compensation scheme to allow persons to make claims for compensation from the Fund for damage to certain assets (improvements and household and other effects) caused by coal or shale mining subsidence. Proprietors of colliery holdings are required to make contributions to the Fund. So long as a proprietor of a colliery holding has paid its required contributions to the Fund and observed the requirements to the relevant mining title, it is not liable for any damage caused by subsidence arising from its activities.

The compensation scheme established by the Principal Act also provides that claims for compensation may be made for proper and necessary expenses incurred in preventing or mitigating such damage where, in the opinion of the Board, an owner of an asset could reasonably have anticipated that the damage would otherwise have arisen from a subsidence that has taken place—see current section 12A (1) (b) of the Principal Act.

For example, an owner of a house may claim compensation for preventative or mitigating work (such as building retaining walls or underpinnings, etc), before damage to the house occurs, if the damage is reasonably anticipated damage from a subsidence that has taken place.

The Board also has a function under section 13A of the Principal Act that enables it to arrange for preventative or mitigating works to be carried out as a means to reduce the total prospective liability of the Fund. The exercise of this function is within the discretion of the Board and the Principal Act does not provide for a statutory appeal to the Land and Environment Court regarding such decisions.

The High Court Decision

The High Court case of *Jemena Gas Networks (NSW) Limited v Mine Subsidence Board* [2011] HCA 19 expanded the operation of this scheme. In this case, Jemena Gas Networks (NSW) Limited, the owner of gas pipelines between Moomba and Sydney, was made aware that coal mining would take place under certain of their pipelines. Expert consultants predicted that the planned coal mining would cause subsidence that would damage a pipeline unless preventative or mitigating works were carried out. Consequently Jemena caused these works to be carried out (excavating the pipeline, decoupling it from the soil and carrying out associated filling). When Jemena claimed for compensation for the works, the Board refused to pay the claim relying on the fact that subsidence had not occurred before the expense of the works was incurred.

The High Court held, as a matter of legal interpretation, that a claim could be made under this scheme even before the subsidence had commenced, so long as it was reasonably anticipated that the subsidence would commence. The High Court reasoned that the Board's interpretation of the law would mean that an owner faced with slow subsidence would be able to claim compensation for preventative and mitigating works, but an owner faced with simultaneous subsidence and damage would not. In the opinion of the High Court, this result could not have been the intention of Parliament.

The High Court's expanded interpretation of section 12A of the Principal Act is now the law that governs the payment of compensation from the scheme.

The Amendments

Schedule 1 [3] and [4] amend section 12A of the Principal Act to modify and limit the operation of the compensation scheme as expanded by the High Court. Under the proposed new section 12A (1A), the Board must not make a payment from the Fund for a claim for any preventative or mitigative expense unless:

- (a) the claim is made after the subsidence concerned has commenced, and
- (b) the expense is incurred or proposed after the subsidence concerned has commenced, and

- (c) at the time the expense is incurred or proposed the damage concerned is more likely than not to occur, and
- (d) the Board is satisfied that the preventative or mitigating work (or proposed preventative or mitigating work) is appropriate and necessary to prevent or mitigate the damage concerned, and
- (e) the subsidence concerned is not due to operations carried on by the owner.

Schedule 1 [3] also inserts proposed section 12A (1B) into the Principal Act to provide that the Board may reject a claim for preventative or mitigative expenses if the Board is of the opinion that the total preventative or mitigative expenses claimed are disproportionate to the reasonably expected total expense of repairing or replacing the improvements or household or other effects concerned if no preventative or mitigating work had been or were to be carried out.

Schedule 1 [5] and [6] make consequential amendments to section 12B (Appeals) of the Principal Act.

Amendments relating to notification of Mine Subsidence Board decisions and reasons for decisions

Schedule 1 [2] and [4] insert provisions into the Principal Act to make it clear that the Board must notify claimants of its decisions relating to claims for compensation under sections 12 and 12A of that Act and the reasons for those decisions.

Amendments relating to approvals and certificates of compliance

Schedule 1 [7] extends the duration of approvals to alter or erect improvements, or to subdivide land, within a mine subsidence district from 2 years to the period specified in the approval concerned, being a period of at least 2 years, but not more than 5 years, from the date of the approval.

Schedule 1 [9] makes it clear that the prohibition against making compensation payments from the Fund in relation to improvements that have been erected or altered, or subdivisions of land made, without the approval of the Board (or not in accordance with any such approval) extends to:

- (a) claims for preventative or mitigative expenses under section 12A of the Principal Act, and
- (b) claims relating to household or other effects fixed or attached to the unapproved improvement or damaged as a consequence of damage to the unapproved improvement, and
- (c) claims relating to improvements on land within an unapproved subdivision that were erected or altered after the land was subdivided, and
- (d) claims relating to household or other effects on land within an unapproved subdivision for the purpose of erecting or altering an improvement.

Schedule 1 [1] and [8] make consequential amendments.

Schedule 1 [10] deals with the circumstances in which the Board may issue a certificate of compliance after an improvement was altered or erected, or a subdivision of land made, in such circumstances. A certificate of compliance is for all purposes deemed to be conclusive evidence that the requirements of the Principal Act relating to the improvement or the subdivision have been complied with up to the date of the certificate.

The proposed new provisions provide that the Board may issue such a certificate if the Board is satisfied that it is appropriate to do so having regard to the circumstances of the case. However, the Board must not issue the certificate in relation to the following:

- (a) an improvement that is a residential building that was altered or erected more than 15 years before the application for the certificate was made, unless the Board is of the opinion that:
 - (i) the failure to obtain the approval was not the fault of the applicant, or
 - (ii) exceptional circumstances exist,
- (b) an improvement that is not a residential building, unless the Board is of the opinion that exceptional circumstances exist.

Amendment relating to classified roads

Schedule 1 [11] inserts a provision into the Principal Act to make it clear that Roads and Maritime Services (*RMS*) may make claims for compensation under sections 12 and 12A of the Principal Act in relation to any classified road as if RMS were the owner of the road and payments may be made from the Fund to RMS accordingly.

Savings and transitional amendments

Schedule 1 [12] and [13] contain savings and transitional amendments. **Schedule 1 [12]** enables regulations of a savings or transitional nature to be made. **Schedule 1 [13]** provides that the proposed amendments to sections 12A and 15 (5) (b) of the Principal Act by the proposed Act are to be taken to have commenced on the date that the Bill for the proposed Act was first introduced into Parliament (the *introduction date*). However, those provisions, as in force immediately before the introduction date, continue to apply in relation to the following:

- (a) a claim lodged with the Board before the introduction date,
- (b) a claim lodged with the Board after the introduction date in relation to an expense incurred before that date.