



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PLC:JvdPgl191222

19 December 2022

Coal Mining Subsidence Compensation Act Statutory Review
Better Regulation Division
NSW Department of Customer Service
4 Parramatta Square, 12 Darcy Street
Parramatta NSW 2150

[Via submission portal](#)

Dear Sir/Madam,

Coal mine subsidence compensation – Discussion Paper

Thank you for the opportunity to comment on the public consultation on the *Coal Mine Subsidence Act 2017*. The Law Society's Property Law Committee has contributed to this submission.

Our feedback on questions in the Discussion Paper is provided in the **attached** comments table.

Any questions in relation to this letter should be directed to Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Joanne van der Plaats
President

Encl.

Statutory Review of the *Coal Mine Subsidence Compensation Act 2017* – Discussion Paper 2022

Law Society of NSW Comments

NO.	Questions for comment	Law Society comments
2. Objectives of the Act		
1.	Are the objectives of the Act still valid? Please explain.	We believe the objectives of the <i>Coal Mine Subsidence Compensation Act 2017</i> (“Act”) remain valid and appropriate.
2.	Are there other objectives that should be included? If so, please identify them and explain why they should be included.	We have no suggestions for additional objectives – the current provision is comprehensive in our view.
3. Compensation for mine subsidence		
3.1 Framework for compensation		
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?	Yes, the framework is working well as far as we are aware, subject to those issues addressed in our responses below.
4.	Do you agree with the types of compensation for mine subsidence damage – (yes/no). If no, what improvements do you suggest?	Yes, we support the continuation of the heads of compensation set out in section 7 of the Act.
5.	Do you think certain types of compensation should be extended to tenants of a property?	There is merit in ensuring that tenants in an affected property are compensated for reasonably foreseeable loss arising from subsidence. There is no sound reason why an owner-occupier should be entitled to compensation relating to accommodation expenses, but a tenant should not. The mechanism for achieving this will need consideration, and will, in part, depend on the category of premises. Any amendments to the Act will need to consider the existing regulatory frameworks for residential premises (for example, sections 49 and 52 <i>Residential Tenancies Act 2010</i>), and retail shop premises (Part 4 <i>Retail Leases Act 1994</i>).

NO.	Questions for comment	Law Society comments
3.2 Making claims		
7.	Do you think that the current requirements for making a claim of compensation are appropriate?	<p>If the scheme is expanded to include claims for tenant losses as foreshadowed in our reply to question 5, there will need to be guidance as to whether such a claim is to be lodged as part of an owner's claim for compensation, or alternatively whether the tenant will be entitled to lodge its own claim.</p> <p>Given the increasing reliance on e-commerce and dealing electronically with Government, we are not convinced that an alternative pathway for claims lodgment is needed.</p>
3.3 Approved procedures		
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?	We note the revision of the approved procedures will be the subject of a subsequent review and have no comments on their current operation at this stage. We note section 14 already provides for the approved procedures to have a broad scope.
3.4 Provision of information in active mining areas		
9.	Do you think the Act should be amended to specify requirements for certain types of information from mine operators?	If there has been any difficulty in obtaining information from mine operators, the inclusion of a statutory framework for ensuring that information is provided to Subsidence Advisory is appropriate.
3.5 Dispute resolution process		
10.	Is the dispute resolution process achieving its aim of providing a no-cost independent review mechanism?	We are unaware of any issues at this stage with the new dispute resolution procedures. The Land and Environment Court is the appropriate venue for appeals, in our view. We do note that the jurisprudence of the Court is at a relatively early stage of development, but in at least one case, it has been noted that the Act provides little guidance about the conduct of appeals and the powers of the Court on appeal: <i>Visser v Department of Customer Service</i> [2021] NSWLEC 88 at [45].
3.6 No contracting out of the Act		
11.	Should contracting out of the Act be considered for government agencies such as Transport for NSW?	We do not support permitting government agencies to contract out of the Act. In our view, it is appropriate that the mine subsidence compensation provisions should operate across the board, rather than leaving risk management to individual government agencies which may not necessarily have the expertise of Subsidence Advisory.

NO.	Questions for comment	Law Society comments
4. Development within mine subsidence districts		
4.1 Risk-based development regulation		
12.	Do you have any comment about mine subsidence districts and how they work?	<p>We support the five-yearly review process for mine subsidence districts.</p> <p>We note the availability of the ePlanning Spatial Viewer as an information source.</p> <p>From a conveyancing perspective, we note the key source of information about whether the property is in a mine subsidence district is the planning certificate under s10.7(2) of the <i>Environmental Planning and Assessment Act 1979</i>. Purchasers have the protection of a statutory warranty under the <i>Conveyancing (Sale of Land) Regulation 2022</i> if the certificate does not show the true status of the land.</p> <p>At the time the 1961 Act was reviewed, we suggested that the independent right of a purchaser to cancel a contract for sale in section 15(5)(a) of the 1961 Act be removed since rescission rights were now addressed in a much wider context by the vendor disclosure and warranty regime. Further, the policy decision to remove the former certificates issued under sections 15B and 15C of the 1961 Act referred to at pages 20 and 21 of the Paper meant that the right to cancel the contract under that Act could no longer be determined authoritatively. That suggestion was not adopted, and the cancellation right was maintained in section 23(1)(a) of the Act. We reiterate our suggestion that this provision be repealed.</p>
5. Additional functions of the Chief Executive		
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?	We agree with the actions that can be taken by the Chief Executive and have no further suggestions.
16.	Are there any matters such as expenses that should be included in the funding of preventative works, for example relocation expenses?	We suggest that if a homeowner is required to relocate, the homeowner should be reimbursed relocation expenses. Relocation expenses could include the actual costs of relocation and rent payable during the period preventative works are carried out.
6. Compliance and enforcement		
21.	Should the penalty levels be adjusted to take account of increases in Consumer Price Index since the Act's enactment in 2018?	We support an adjustment of the penalty levels in accordance with the CPI.

NO.	Questions for comment	Law Society comments
7. Other matters		
7.2 Forward thinking		
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?	As the pool of mine operators to support the Compensation Fund may decline, it is vital that there are sufficient monies provided by existing mine operators in the Compensation Fund, to ensure that it is not the taxpayers who pay for any compensation in the future.