MINE SUBSIDENCE COMPENSATION AMENDMENT BILL 2014

Bill introduced on motion by Mr Anthony Roberts, read a first time and printed.

Second Reading

Mr ANTHONY ROBERTS (Lane Cove—Minister for Resources and Energy, and Special Minister of State) [3.27 p.m.]: I move:

That this bill be read a second time.

This bill will secure the ongoing viability of the Mine Subsidence Compensation Scheme and improve and clarify the operation of the Act more generally. The Mine Subsidence Compensation Act 1961 established a compensation scheme for damage arising from subsidence caused by underground coal mines. The scheme provides for compensation for works to prevent or mitigate subsidence related to buildings and service improvements. It provides for compensation to repair such damage or to replace the damaged improvement. The compensation scheme is administered by the Mine Subsidence Board and funded by a levy on coal mine owners.

New South Wales is only one of a few places in the world to have legislated such a compensation scheme. In some other jurisdictions compensation for subsidence related damage is only available by taking court action. Despite the worthy aims of the Act there is room to clarify and improve its operation. Many of its provisions were drafted more than 50 years ago and they are out of step with contemporary drafting practice. A considerable amount of case law in this area has come about for this reason. Section 12A, as the member for Kuring-gai will be aware, is a good example of this. It provides compensation for works to prevent or mitigate damage anticipated to arise from subsidence.

However, legal challenges have highlighted that there is some ambiguity in its meaning. Section 12A was considered by the High Court in 2011. The High Court acknowledged that the meaning of this provision was unclear. Ultimately, the court held that compensation was payable for anticipated damage, even though the subsidence itself had not yet occurred. Previously, the established position was that compensation for such works was payable only if the subsidence had actually occurred. This High Court decision, which turned on the meaning of an ambiguously drafted provision, has the potential to destabilise the compensation scheme. There are a large number of property owners who could now make such a claim because in theory their property may be damaged by future subsidence. However, in many cases the works would be unnecessary. This is because the subsidence may never occur or, even if it does occur, the damage may be much less than predicted.

The board is well placed to make such an assessment. However, it has little control over these works. This is because section 12A enables reimbursement for works already undertaken. It was never intended that the compensation scheme be used to fund such low risk works on such a large scale. The bill addresses this risk. It clarifies that compensation under section 12A is available only for expenses incurred after the subsidence has commenced. Importantly, this amendment will not force landholders to stand by and wait for subsidence to occur before they can take action. Section 13A of the Act already empowers the board to fund or undertake works to prevent or mitigate damage in these circumstances. The bill will not change this. Where subsidence is expected, but has not yet occurred, landholders will

have to approach the board before works are undertaken, rather than afterwards. This upfront role gives the board greater control over works where subsidence has not yet occurred.

The bill makes several other amendments to clarify the criteria for compensation under section 12A. Currently, compensation under this provision turns on whether the damage is reasonably anticipated. The bill replaces this with a more-likely-than-not test. This test is clearer, consistent with other legislation and supported by a body of case law. The bill also gives the board discretion to refuse a claim for preventative works if the costs are disproportionate to those of repairing or replacing the damaged improvement. This amendment is also directed at securing the ongoing viability of the compensation scheme. Importantly, it will not prevent a person from claiming compensation if actual damage occurs.

To safeguard the interests of claimants, the bill also enlarges existing merit review rights for section 12A claims. The bill clarifies a number of provisions relating to board approvals and compliance certificates. There are currently 21 mine subsidence districts across the State. These are areas vulnerable to subsidence from coalmines. The board's approval is required to build or alter an improvement, or to subdivide land in these areas. This ensures that improvements are built with subsidence in mind. There is a mismatch between approval periods under the Mine Subsidence Compensation Act and the Environmental Planning and Assessment Act. At present, the board can issue an approval for only up to two years at a time. In contrast, an approval under the Environmental Planning and Assessment Act is valid for up to five years. The bill will enable the board to issue an approval for a period of between two and five years. These amendments will drive consistency between these two approval periods. This will increase certainty for developers and boost investment confidence in areas vulnerable to subsidence, such as the Newcastle central business district.

Sometimes improvements or subdivisions are made without the board's approval. In these circumstances, a claim for compensation is barred. However, due to a drafting oversight, the bar applies only to a section 12 claim for damage. The bar does not apply to a section 12A claim for preventative or mitigative works. In 2012, the New South Wales Supreme Court observed the need to amend the Act to rectify this anomaly. The bill makes clear that both section 12 and 12A claims are barred if they relate to an improvement or subdivision made without board approval. The bar can only be lifted if a person obtains a compliance certificate from the board. In broad terms, a compliance certificate operates as a retrospective approval of an improvement or subdivision. The test for granting a compliance certificate is cumbersome and impracticable for the board to apply. In addition, compliance certificates can be used by sophisticated entities to deliberately circumvent the approval requirements. The bill addresses both of these issues. Firstly, it simplifies the test for granting a certificate. Secondly, it imposes sensible restrictions on issuing compliance certificates.

In summary, this bill aims to secure the ongoing viability of the compensation scheme and clarify the operation of the Act. The amendments will remove some current uncertainties that can make administration of the Act difficult for all involved. The amendments will ensure that the legislation remains relevant and that the important work of the Board can continue. It would be remiss of me if I did not acknowledge the professionalism of the Mine Subsidence Board in administering the Act. The board provides an outstanding service to those affected by mine subsidence. However, its work extends well beyond its statutory role. Many people are unaware that the board offers a free advisory service to members of the public. The board also provides expert advice to property owners, government departments and authorities,

local councils, community organisations and industries. It has a high profile in the community, especially in regions vulnerable to mine subsidence. For instance, it uses advertising campaigns, community forums and displays at regional shows to spread awareness about mine subsidence. For more than 16 years the board's mascot, Maurie the Mole, has been educating children and young adults about the dangers of mine subsidence. These amendments proposed in this bill will serve to benefit the board's work. I commend the bill to the House.

Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.