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MINE SUBSIDENCE COMPENSATION AMENDMENT BILL 2014

Second Reading

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The Hon. JOHN AJAKA (Minister for Ageing, Minister for Disability Services, and Minister for the Illawarra) [3.15 p.m.]: I move:

That this bill be now read a second time.

The Mine Subsidence Compensation Amendment Bill 2014 makes very useful amendments to the Mine Subsidence Compensation Act 1961. These amendments will secure the ongoing viability of the Mine Subsidence Compensation Scheme. They will also improve and clarify the operation of the Act more generally. The Mine Subsidence Compensation Act establishes a compensation scheme for damage arising from subsidence caused by underground coalmines. The scheme provides for compensation for works to prevent or mitigate subsidence-related damage to buildings and surface improvements. It provides for compensation to repair such damage or to replace the damaged improvement.

This compensation scheme is administered by the Mine Subsidence Board and is funded by a levy on coalmine owners. New South Wales is one of only a few places in the world to have legislated such a compensation scheme. In 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 over 50 years ago and they are out of step with contemporary drafting practice. For this reason a considerable amount of case law in this area has been produced. Section 12A is a good example of this. It provides compensation for works to prevent or mitigate damage anticipated to arise from subsidence.

Section 12A was considered by the High Court in 2011. 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 only payable if the subsidence had actually occurred. The High Court's decision has the potential to destabilise the compensation scheme. There are a large number of properties that could now make such a claim because in theory they may be damaged by future subsidence, but in many cases the works would be unnecessary 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 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. There has not been a rush of these claims since the High Court decision; however, the door remains open for such claims, which will seriously threaten the viability of the compensation scheme. The bill addresses this risk and clarifies that compensation under section 12A is available only for expenses incurred after the subsidence has commenced. Section 13A already empowers the board to fund or undertake works to prevent or mitigate damage in these circumstances. 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".
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The bill replaces this with a more-likely-than-not test. This test is clearer and more 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. As I noted, section 13A empowers the board to award funding for preventative works before subsidence has occurred. The bill proposes amendments to provide greater certainty and transparency about how section 13A operates. The bill introduces a formal application pathway for funding under that section. It also clarifies the criteria for deciding an application for funding under that section. In short, the board may approve an application for funding under section 13A if subsidence has not commenced, the expenditure will result in a net benefit to

the fund, and there are special circumstances that justify funding before subsidence has commenced. The bill also amends section 13A to require the board to give effect to any policy declared by the Minister. This will provide further clarity about how applications for funding under that section will be decided. The bill also amends section 12B to enable persons who apply for funding under section 13A to seek merits review in the Land and Environment Court.

The bill clarifies a number of provisions relating to board approvals and compliance certificates. There are 21 mine subsidence districts across the State, which 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. Subdividing land or building improvements in breach of this requirement can pose a public safety risk. At present, the maximum penalty for breaching this requirement is only 20 penalty units, or $2,200. The bill will introduce a two-tier offence provision that distinguishes between individuals and corporations. Maximum penalties will be increased to 100 penalty units for individuals and 500 penalty units for corporations.

There is now a mismatch between approval periods under the Mine Subsidence Compensation Act and the Environmental Planning and Assessment Act. 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. This 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 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 any claims for compensation are barred if they relate to an improvement or subdivision made in a mine subsidence district without board approval. Currently the bar can be lifted only 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 only by sophisticated entities to deliberately circumvent the approval requirements. The bill addresses both of these issues. It simplifies the test for granting a certificate and it imposes sensible restrictions on issuing compliance certificates. In summary, this bill aims to secure the ongoing viability of the compensation scheme and to 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. I commend the bill to the House.