

Department of Customer Service



Coal Mine Subsidence Compensation Act 2017

Statutory Review

August 2023

Acknowledgement of Country

The NSW Department of Customer Service acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that contributed to the development of this statutory review.

We advise this resource may contain images, or names of deceased persons in photographs or historical content.

Information

Coal Mine Subsidence Compensation Act 2017

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This publication avoids the use of legal language, with information about the law summarised or expressed in general statements. This information in this document should not be relied upon as a substitute for professional legal advice.

Contents

1	Executive Summary	1
1.1	Executive Summary.....	2
2	Recommendations	3
2.1	Recommendations.....	4
3	Introduction	7
3.1	Background: coal mine subsidence in NSW.....	8
3.2	Development of the Act.....	8
3.3	Statutory review of the Act	9
4	Findings of the Review	10
4.1	Expanding compensation to assist people affected by mine subsidence.....	11
4.1.1	Background: types of compensation in the Act.....	11
4.1.2	Extending relocation payments to tenants.....	13
4.1.3	Payment for expenses associated with emergencies.....	14
4.2	Improving claim assessment and determination to support customers.....	15
4.2.1	Making claims	15
4.2.2	Provision of key pieces of information to Subsidence Advisory	16
4.2.3	Process of assessing and determining claims.....	20
4.2.4	Approved Procedures.....	22
4.2.5	Compliance and enforcement with the Act	24
4.3	Clarifying the functions of Subsidence Advisory to respond to subsidence impacts and risks	25
4.3.1	Objects of the Act.....	25
4.3.2	Scope of preventative and mitigative expenses.....	26
4.3.3	Additional functions of the Chief Executive.....	27
4.3.4	Contracting out of the Act	29
4.3.5	Appropriate parties in proceedings in the Land and Environment Court.....	30
4.4	Maintain the framework for development in mine subsidence districts	30
5	Appendix	34
5.1	Appendix A: List of Discussion Paper questions.....	35
5.2	Appendix B: List of stakeholder submissions.....	36
5.3	Appendix C: Public consultation process.....	36

1

Executive Summary

1.1 Executive Summary

Mine subsidence is the movement of the ground that can occur after underground coal mining. After coal is extracted from beneath the ground, the land above can subside. This can cause damage to buildings, and other property, on the ground surface above the mine.

In NSW, if a property is damaged as a result of mine subsidence, the property owner can lodge a claim for compensation.

The *Coal Mine Subsidence Compensation Act 2017* (NSW) (the Act)¹ sets up the legal framework for this to occur. Subsidence Advisory NSW (Subsidence Advisory) administers the mine subsidence compensation system.

Section 59 of the Act requires the Minister for Better Regulation and Fair Trading to review the Act to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives.

To inform the Review, a Discussion Paper was released for public feedback. Consultation took place over nine weeks from 22 November 2022 to 23 January 2023. The Department received 22 responses, consisting of 10 written submissions and 12 survey responses. All stakeholder feedback received informed the development of the Review.

The 2017 reforms introduced changes to the way claims are assessed, including implementing a case advisor function to provide dedicated support and advocacy on behalf of claimants and an independent claim assessment process. The experience of Subsidence Advisory administering the claims process over the last five years has informed the recommendations in the Review.

During 2023, multiple subsidence events occurred while the Review was taking place. The experience of Subsidence Advisory and customers during these events have also informed the recommendations of the Review.

The Review finds that the objectives of the Act remain valid. It makes 9 recommendations to amend the Act to secure those objectives. These include:

- Expanding compensation to assist people affected by mine subsidence
- Improving claim determination to support customers
- Clarifying the functions of Subsidence Advisory to respond to subsidence impacts and risks
- Increasing penalties to improve compliance by mine operators
- Maintaining the framework for development in Mine Subsidence Districts.

These recommendations aim to improve the effectiveness of the compensation framework, to ensure those impacted by coal mine subsidence are supported.

¹ *Coal Mine Subsidence Compensation Act 2017* (NSW) (CMSC Act).

2

Recommendations

2.1 Recommendations

Expanding compensation to assist people affected by coal mine subsidence

Recommendation 1

Allow residential tenants to make a claim for compensation, for relocation and short-term compensation expenses where the property they are leasing is uninhabitable, under repair or in the course of construction. This could be due to damage from coal mine subsidence, or preventative and mitigative works.

Recommendation 2

Introduce powers for Subsidence Advisory to provide payments to residents, both property owners and tenants, for expenses arising from emergency, urgent and temporary actions, including payments for relocation and other incidental expenses incurred as a result of relocation. Make these payments available for tenants and/or property owners who are residing in affected properties. Also allow for consideration of payments for damage to items in the property and out of pocket expenses, as a result of a subsidence event.

Improving claim assessment and determination to support customers

Recommendation 3

Allow claims to be lodged outside of the online Subsidence Advisory NSW Portal, in a manner and form approved by the Chief Executive of Subsidence Advisory (the Chief Executive).

Recommendation 4

Introduce measures to increase the efficiency of assessments of future claims and inform development requirements by providing for key pieces of information:

- introduce the requirement for pre-mining inspections and make this requirement a pre-requisite for making a claim within the estimated zone of influence in an active mining area
- make the responsibility for carrying out inspections, including pre-mining inspections, to sit exclusively with Subsidence Advisory. The cost of pre-mining inspections will be recovered from the relevant mine operators on a cost recovery basis.
- Subsidence Advisory to have responsibility for determining where the estimated zone of influence is, informed by estimated zones of influence for future mining operations prepared by mine operators
- Subsidence Advisory to have discretion to deal with claims where a pre-mining inspection was required but was not carried out, where Subsidence Advisory determines that there are extenuating circumstances.
- introduce a new power to allow Subsidence Advisory to require information and documentation from coal mine operators, outside of the existing authorised officer powers, where it is reasonably required to inform future assessments and development requirements. Introduce a penalty for coal mine operators' non-compliance with a request for information and documentation under this power, in consultation with the Department of Communities and Justice.

Recommendation 5

Clarify the role of Subsidence Advisory and other persons in relation to the assessment and determination of claims, including that:

- Subsidence Advisory can conduct assessments of claims
- Subsidence Advisory determines all claims
- mine operators do not determine claims for compensation, and that claims should be determined in line with an assessor's report
- the role of independent assessors is independent of mine operators.

Recommendation 6

Expand the scope of the matters that the Approved Procedures may deal with to include:

- the making, assessment and determination of claims
- the revision of the determination of a claim
- steps that occur prior to mining commencing and prior to a claim being lodged.

Recommendation 7

Increase the amount of penalties for existing offences in the Act, to reflect increases in the Consumer Price Index since the commencement of the Act in 2018, ensuring adequate deterrence, in consultation with the Department of Communities and Justice.

Clarifying the functions of Subsidence Advisory to respond to coal mine subsidence impacts and risks

Recommendation 8

Clarify provisions for preventative or mitigative expenses:

- clarify that 'preventative or mitigative expenses' applies to existing improvements and goods, not future ones
- give the Chief Executive discretion to fund reasonable expenses that may be incurred by a property owner and/or tenant, associated with preventative and mitigative works, such as temporary relocation expenses
- clarify that where the owner of an improvement is paid from the Fund to carry out preventative or mitigative works themselves, any damage from these works is not eligible for compensation.

Recommendation 9

Clarify some elements of the responsibilities of the Chief Executive:

- clarify that the Chief Executive may refuse a development approval in a mine subsidence district for decisions made under the Act, where the Chief Executive is of the opinion that the land may subside as a result of previous extraction of coal from the land, or if coal were to be extracted from the land in the future. Note that development applicants would still be required to obtain the relevant approvals from local and other relevant consent authorities, under other relevant legislative frameworks.
- allow the Chief Executive to demolish improvements subject to relevant development approvals on land purchased by the Chief Executive, where it is not practicable to restore damaged improvements or goods to the condition they were in before the subsidence occurred.
- limit the broad delegation powers allowing the Secretary to delegate their functions to any officer in the Department, to ensure review powers are not delegated to the Chief Executive or any person employed in Subsidence Advisory.

3

Introduction

3.1 Background: coal mine subsidence in NSW

Most active underground coal mines in NSW use longwall mining methods. Longwall mining involves the extraction of entire sections of coal using high-powered machinery and generally occurs at more than 200 metres beneath the ground. As the machinery moves ahead, the mined-out area falls in, causing the ground above to subside. Subsidence from longwall mining generally occurs over a large area, with the majority of subsidence occurring a short time after mining has taken place.

Historically, underground coal mines throughout NSW used bord and pillar mining methods, where coal is extracted while leaving pillars of untouched material to support the roof of the mine. This type of mining occurred all over NSW but was extensively used in the Hunter and Newcastle regions.

In some cases, coal extraction may have occurred over 200 years ago. Many homes are built over old non-active mines that may never be impacted by subsidence, however occasionally, parts of the old mine workings collapse, resulting in subsidence. These workings may deteriorate over a long time.

The signs of mine subsidence damage to buildings and other structures can range from cracking to walls and jammed doors, to more significant structural issues. In most cases, buildings damaged by mine subsidence remain safe and can be used until they are repaired.

The extent of mine subsidence damage can vary depending on the location of a building in proximity to the mine workings. It is possible for the ground directly above collapsed mine workings to subside, without causing damage to above buildings.

It is also possible for a building that is not directly under a mine to experience mine subsidence damage. Buildings on or near the edge of subsided ground may experience damage as a result of tilts and strains in the ground surface.

3.2 Development of the Act

The Act took effect on 1 January 2018. This followed a 2016 review of the former *Mine Subsidence Compensation Act 1961* (the 1961 Act) by the then NSW Department of Finance, Services and Innovation.

The 2016 review identified a need to improve:

- the claims experience for property owners
- the compensation framework
- the Mine Subsidence Board's (MSB) administration of the system.

To provide a fairer compensation system, reforms were made under the Act to the mine subsidence compensation framework to distinguish between claims arising from subsidence in active and non-active mining areas. Under the Act, proprietors of active coal mines (referred to here as mine operators) were made financially liable for the subsidence damage caused by their coal mine. Compensation for subsidence damage arising from non-active coal mines is paid from the Coal Mine Subsidence Compensation Fund and changes to the levy framework were introduced to enable this. The levy was also reduced to offset the new direct liability of mine operators for damage in active mining areas for which they are responsible.

The Government continued to administer all claims, regardless of whether the damage was caused by active or non-active mines. The reforms also introduced changes to the way claims are assessed, including implementing the case advisor function to provide dedicated support and advocacy on behalf of claimants and an independent claim assessment process.

Major reforms introduced by the Act also included:

- the abolishment of the MSB, and transfer of its functions to the Chief Executive of Subsidence Advisory NSW
- the introduction of a new compensation framework including various structural and operational improvements.

3.3 Statutory review of the Act

Under section 59 of the Act, the Minister is to review the Act to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives.

The objects of the Act are to provide for:

- a fair, efficient, and sustainable compensation framework for dealing with the impacts of coal mine subsidence (section 3(1)), and in particular
 - a scheme for the provision of compensation for damage caused by subsidence resulting from coal mine operations (section 3(2)(a))
 - the assessment and management of risks associated with subsidence resulting from coal mine operations (section 3(2)(b)).

The Act requires the review to be undertaken as soon as possible after the period of 5 years from the date of assent to the Act. A report on the outcome of the review must be tabled in each House of Parliament no later than 14 August 2023.

A Discussion Paper on the Statutory Review of the Act was publicly released for feedback in 2022. The Discussion Paper explored:

- the relevance of the objectives of the Act
- the coal mine subsidence compensation system
- development regulation within Mine Subsidence Districts (MSDs)
- compliance and enforcement of the Act.

It also posed the question regarding the future framework to fund mine subsidence.

Consultation for the Discussion Paper took place over nine weeks from 22 November 2022 to 23 January 2023. The Department received 22 responses, consisting of 10 written submissions and 12 survey responses. A list of stakeholder submissions is in **Appendix B**.

All the submissions made during the consultation were reviewed and considered as part of the Statutory Review of the Act.

4

Findings of the Review

4.1 Expanding compensation to assist people affected by mine subsidence

4.1.1 Background: types of compensation in the Act

Existing types of compensation

The different types of compensation that can be claimed under the Act are:

- Compensation for damage arising out of subsidence, as follows:
 - compensation for any damage to improvements (which are defined by the Act to include buildings or works erected or constructed on land, or infrastructure)² or goods owned by the person that arises from subsidence³
 - compensation to meet the reasonable and necessary expenses incurred or to be incurred as a result of such damage
 - where a building or works or any part of a building or works is leased, reasonable lost rent while building or works are uninhabitable, under repair or under construction
 - where a building or works or any part of a building or works is occupied by the owner, reasonable accommodation expenses of the owner including relocation expenses and rent, during the period the building or works are uninhabitable, under repair or under construction.⁴
- Compensation in relation to actions to prevent or mitigate damage.⁵

Compensation may only be provided to the owners of improvements or goods, not to, for example, tenants leasing a property damaged by subsidence.

The limitations on claims are as follows:

- The Approved Procedures may provide for a reduction in compensation for claims for damage to improvements, if the damage was greater than it otherwise would have been because the improvement was constructed or maintained in a negligent or improper manner.⁶
- Compensation will not be paid in relation to improvements or goods used in connection with a coal mining operation if that operation was the cause of the subsidence.⁷
- Claims for the cost of actions to prevent or mitigate damage will not be compensated unless; the subsidence has commenced, the expense is incurred or proposed after the subsidence has commenced, at the time the expense is incurred or proposed, the damage is more likely than not to occur, the

² CMSC Act, section 4(1).

³ Compensation is not payable where the subsidence is due to operations carried on by the owner of the improvements or goods or an affiliate of the owner (CMSC Act, section 7(1)(a)).

⁴ CMSC Act, section 7(1).

⁵ CMSC Act, section 7(2).

⁶ CMSC Act, section 9(1).

⁷ CMSC Act, section 9(2).

preventative or mitigating work is appropriate and necessary to prevent or mitigate the damage, and the subsidence is not due to operations carried on by the owner.⁸

- Total preventative or mitigative expenses must be proportionate to the reasonable expected costs of repairing or replacing the improvement or goods if no preventative or mitigating work was carried out.⁹

Types of compensation remain appropriate

The Review sought feedback from stakeholders on whether they agreed with the types of compensation, and whether there were any suggested improvements.

Mining industry stakeholders and the Law Society of NSW agreed that the types of compensation for mine subsidence damage were sufficient.

Residents were evenly split on whether they agreed with the types of compensation. Some residents' suggestions included:

- compensation for the expenses of any work necessary to comply with Mine Subsidence District approval conditions
- compensation should be enough to relocate to a new property, if necessary
- compensation for emotional or mental health harms such as the stress or anxiety of subsidence damage
- compensation should be sufficient to be restored regardless of their condition – for example older structures that were damaged should be replaced with newer ones
- make types of compensation broader and less descriptive, to prevent mining companies from avoiding compensation
- compensation for legal expenses from a claim, regardless of outcome
- extending compensation to non-coal mine subsidence.

The Review notes that under the Act, reasonable compensation for the accommodation expenses of the owner, including relocation expenses and rent may be paid.¹⁰ The Review does not recommend providing compensation for the costs of work necessary to comply with development approval conditions in MSDs, because the cost of complying with development approval conditions imposed by a consent authority, such as a local council, is typically borne by the applicant.

The Review acknowledges that residents may be significantly impacted when subsidence damage occurs. The Review notes that under the 2017 reforms, a Case Advisor function was established within Subsidence Advisory to provide a single point of contact and to support claimants throughout the claim process. Subsidence Advisory also operates a 24-hour emergency hotline to allow members of the public to report safety or serviceability issues caused by coal mine subsidence. Subsidence Advisory coordinates a response following any report through this hotline.

The Review considers that the existing types of compensation are appropriate for ensuring that damage caused by underground coal mining is compensated, however,

⁸ CMSC Act, section 10(1).

⁹ CMSC Act, section 10(2).

¹⁰ CMSC Act, section 7(1)(d).

makes recommendations for a new head of compensation for expenses borne by tenants and also allow lump sum payments for relocation expenses for residents.

4.1.2 Extending relocation payments to tenants

In certain situations, preventative, mitigative or repair works may require residents of a property to relocate for the duration of works. Under the Act, when a property is uninhabitable due to certain types of building works or construction because of damage from subsidence, the property owner (if they are occupying the property) is entitled to reasonable compensation for accommodation expenses.¹¹ This can include relocation expenses and rent for accommodation while the property is uninhabitable.

The Review sought feedback on whether similar financial provision should be made for tenants in the Act.

The Law Society of NSW expressed the view that there is merit in extending compensation to affected tenants, but noted that existing regulatory frameworks (e.g. section 49 and section 52 of the *Residential Tenancies Act 2010* and Part 4 of the *Retail Leases Act 1994*) needed to be considered.

Mining industry stakeholders were split on this question. Some considered that compensation should be paid to one claimant only (the property owner), who would be responsible for resolving any losses with the tenant. Another mining industry stakeholder considered it reasonable to compensate tenants for relocation costs and higher rent, if required to vacate due to subsidence damage. The mining industry stakeholder was of the view that such compensation should be limited to ensure compensation for higher rent was only for properties of a similar size and condition to the damaged property.

Residents were also split on this question. Some residents agreed that tenants should be compensated as they were also impacted by subsidence. This could include relocation costs and higher rent in a new tenancy. Other residents disagreed, either preferring compensation be handled between the landlord and tenant, or that tenants should not be entitled to any compensation as they did not own the property.

Residents are typically required to vacate the premises during prevention or mitigation works being carried out by Subsidence Advisory,¹² such as ground remediation works through grouting (pumping large volumes of concrete into the underground void to fill and stabilise the subsidence). These works can take from several weeks to several months. In some cases the duration of works may also be shorter than the length of available leases in the area. In this case, short-term accommodation would be a tenant's only option. The available short-term accommodation would likely be more expensive than the tenant's previous rental payments.

The Review recommends amending the Act to allow residential tenants to make a claim for reasonable compensation for relocation and short-term accommodation expenses, where the property they are leasing is uninhabitable, under repair or in the course of construction. This could be because of damage arising from subsidence, or because of preventative or mitigative works taking place.

This compensation for short-term accommodation should be limited to avoid 'double dipping' as tenants will no longer be required to pay rent, but may have difficulty securing a similar property to rent at short notice. This basis for claiming compensation

¹¹ CMSC Act, section 7(1)(d).

¹² Under CMSC Act, section 29.

should also exclude the making of claims where compensation has been paid to the property owner to carry out repairs to the property, as in these circumstances the property owner and tenant will have sufficient notice of the work required to make appropriate arrangements.

Recommendation 1

Allow residential tenants to make a claim for compensation, for relocation and short-term compensation expenses where the property they are leasing is uninhabitable, under repair or in the course of construction. This could be due to damage from coal mine subsidence, or preventative and mitigative works.

4.1.3 Payment for expenses associated with emergencies

The Act allows Subsidence Advisory to take emergency, urgent and temporary actions in certain circumstances including where subsidence damage to the surface of land may cause danger to any member of the public.¹³

For some subsidence events, residents (both property owners and tenants) require relocation and Subsidence Advisory arranges temporary accommodation. During the 2023 subsidence events, inquiries were received about whether expenses associated with the relocation could be reimbursed or compensated. This included expenses for food, clothing (if the resident's belongings were inaccessible and other incidentals).

The Act currently does not include a provision enabling the reimbursement of reasonable expenses such as food, clothing, and other incidentals where residents are required or asked by Subsidence Advisory to evacuate their home. The Review considers that the reimbursement of these expenses would be reasonable, and provision should be made in the Act to allow Subsidence Advisory to provide reimbursement payments to residents for reasonable expenses that arise from emergency, urgent and temporary actions.

Given the urgent nature of the response, and the relatively small costs for the expenses, the Review considers it appropriate for these payments to be at the discretion of the Chief Executive of Subsidence Advisory rather than a new head of compensation claim. Policy guidance could be developed to ensure that payments and payment amounts would be provided in appropriate circumstances.

Recommendation 2

Introduce powers for Subsidence Advisory to provide payments to residents, both property owners and tenants, for expenses arising from emergency, urgent and temporary actions, including payments for relocation and other incidental expenses incurred as a result of relocation. Make these payments available for tenants and/or property owners residing in affected properties. Also allow for consideration of payments for damage to items in the property and out of pocket expenses, as a result of a subsidence event.

¹³ CMSC Act, section 27.

4.2 Improving claim assessment and determination to support customers

4.2.1 Making claims

The Act outlines the process for lodging claims. A person can apply for compensation by lodging a claim through an online portal accessed via Subsidence Advisory's website¹⁴. However, some customers may experience difficulty with lodging their claim through the portal, due to digital literacy or accessibility issues.

Claims must be lodged within 12 months of when the claimant first knows that the damage was caused by subsidence.¹⁵ Claims for preventative or mitigative expenses must be made within three months after the expense becomes known to the person making the claim.¹⁶

The Review sought feedback on whether the current requirements for making a claim are appropriate.

The Law Society of NSW considered the current requirements for making claims appropriate.

Mining industry stakeholders generally requested more detail in claims, including the components and amount of the claim. Some mining industry stakeholders suggested reducing the period when claims could be lodged to 6 months, down from 12 months. Another mine industry stakeholder suggested limiting it to the earlier of 12 months from the claimant becoming aware of the damage, or 3 years from the end of mining a longwall within 200 metres of the property.

Residents had mixed responses to this question. Where they considered that the current requirements for making a claim were not appropriate, they raised issues such as the limitation periods for claims being too short. One stakeholder suggested the wording of claim requirements made it difficult to allocate responsibility to mine operators for claims.

The Review considers the current limitation period for making claims to be appropriate because it balances the needs of claimants with the effective operation of the compensation scheme. It may take time for a resident to become aware of possible subsidence damage. Noting the feedback from mining industry stakeholders, however, there should still be some limitation on the period during which claims may be lodged.

The Review recommends that the requirements for making a claim be improved to enable greater flexibility for customers, to allow claims to be lodged outside of the online portal. Subsidence Advisory should be given power to establish the form and manner of these claims. This will allow claimants to lodge claims, where accessing the portal is difficult.

¹⁴ CMSC Act, section 11.

¹⁵ Alternatively, the Chief Executive may determine that the owner should have known on a particular day that the damage was caused by subsidence and the claimant will have 12 months from that day to make a claim. The Chief Executive may also determine that a period longer than 12 months for the making of a claim is justified in the circumstances of the case. CMSC Act, section 11(3).

¹⁶ CMSC Act, section 11(4).

Recommendation 3

Allow claims to be lodged outside of the online Subsidence Advisory NSW Portal, in a manner and form approved by the Chief Executive of Subsidence Advisory.

4.2.2 Provision of key pieces of information to Subsidence Advisory

Pre-mining inspections

The Act allows the Chief Executive to arrange inspections of premises in relation to subsidence, including inspections of premises before coal mining commences, to gather pre-subsidence information.¹⁷

A pre-mining inspection (PMI) is a survey of a property's condition prior to mining commencing, similar to a dilapidation report. PMIs can be carried out by appropriately skilled contractors such as licensed builders or structural engineers. The purpose of a PMI is to determine the condition of a property before mining commences. PMIs are an added protection for property owners to ensure they receive adequate compensation should their property be damaged by subsidence. It also is in the best interests of mine operators to ensure that claims accurately reflect the subsidence damage, and discourages spurious claims.

In some cases, and despite requests, Subsidence Advisory does not receive copies of PMIs from mine operators prior to a claim being lodged.

The subject of PMIs has been raised by both mining industry stakeholders and property owners during consultation for the Review.

One property owner suggested amending the Act to allow Subsidence Advisory to undertake PMIs themselves, or fund residents to obtain their own PMIs.

Some mining industry stakeholders suggested that the Chief Executive should have the power to issue permits to mine operators to access land to carry out their own PMIs. One mining industry stakeholder suggested that PMIs should be a pre-requisite for the making of a claim.

The Review recommends that the Act allow Subsidence Advisory to arrange PMIs. This would assist in providing claimants the most fair, efficient, and sustainable method for determining claims. The details of PMIs could be included under the Approved Procedures, which would require extension to allow this to occur (see **Recommendation 6**).

Benefits of pre-mining inspections

PMIs provide clear evidence of the state of a property prior to subsidence. This evidence, in addition to other information such as survey data, can inform the claims assessment process. Pre-existing damage identified in a PMI may still be eligible for compensation if it is shown to have worsened over time due to subsidence.

Undertaking a PMI reduces the time it takes to assess and determine a claim as the pre-subsidence condition can easily be compared with the post-subsidence condition.

¹⁷ CMSC Act, section 41. However note that there is no power to enter any part of premises used as a residence without the consent of the occupier of the premises.

Without a PMI, it is difficult to accurately determine what damage has occurred since mining commenced due to subsidence and what damage was pre-existing.

For the above reasons, the Review finds that mandating PMIs would make claim determination more efficient and accurate and reduce the likelihood of reviews of decisions.

Subsidence Advisory is independent from mine operators

The Review recommends that Subsidence Advisory engage independent consultants to undertake pre- and post-mining inspections. Stakeholder feedback during consultation suggested that PMIs be carried out independently of mine operators. By allocating responsibility for PMIs to Subsidence Advisory exclusively, both independence and consistency would be promoted.

Making Subsidence Advisory responsible for arranging PMIs would also allow property owners to discuss any concerns regarding the inspection directly with Subsidence Advisory. Currently, where PMIs are arranged by mine operators, property owners must discuss their concerns with the mine operator, as Subsidence Advisory may not receive copies of a PMI report until a claim is lodged.

Pre-mining inspections a pre-requisite to claims

The Review further recommends that PMIs be made a pre-requisite for making a claim within an estimated subsidence impact zone in an active mining area. The responsibility for determining where the estimated subsidence impact zone is should sit with Subsidence Advisory, informed by estimated zones of influence for future mining operations prepared by mine operators. Making PMIs a pre-requisite in these areas will promote fair, efficient and accurate resolution of claims, should subsidence damage occur.

As part of an extraction plan application, mine operators engage mine subsidence engineering consultants/experts to prepare subsidence predictions. Factors which may influence the extent of mine subsidence, can include depth of mining, mining configuration and overlying geology. The subsidence predictions inform the preparation of impact assessments and recommended management and monitoring strategies for the natural and built features in the vicinity. These areas are commonly referred to as the 'zone of influence' within an active mining area.

The Review recommends that mine operators be required to provide this information to Subsidence Advisory, to enable Subsidence Advisory to determine where a PMI would be required as a pre-requisite for making a claim.

Flexibility should be incorporated into these provisions so that if Subsidence Advisory considers that there are extenuating circumstances, it has discretion to allow a claim to be made where a PMI was required as a pre-requisite but was not carried out. Notification of a requirement for a PMI should be extensive, with multiple notifications issued, doorknocking and any other reasonable measures taken.

Properties damaged by subsidence outside of the estimated subsidence impact zone may not have a PMI. Assessment of these claims should be carried out by an independent technical panel consultant. These claimants would not be prevented from making a claim without a PMI.

Provision of information to Subsidence Advisory

To ensure it administers the Act effectively, Subsidence Advisory currently requires mine operators to provide information related to mine subsidence.

This includes property reports completed prior to, or during underground coal mining, subsidence survey data and identification of properties where subsidence may have an impact (within the zone of influence). This information allows Subsidence Advisory to provide accurate advice and support to customers. This information is also important in ensuring claims are managed effectively and accurately.

The Act states that a person must not, without reasonable excuse, fail to produce for inspection any documents or other things when required to do so by an authorised officer in the exercise of the officer's functions under the Act or the Regulations.¹⁸

This power to require production of documents is intended to be used for compliance with and enforcement of the Act, including where there is a suspected contravention of the Act. There is no clear provision in the Act for routine operational provision of information by mine operators to Subsidence Advisory, outside of the context of compliance with or enforcement of the Act. As a result, Subsidence Advisory has had difficulty on occasion obtaining requested information from mine operators. Information that Subsidence Advisory has had difficulty obtaining from mine operators includes:

- Lists of properties within the zone of influence of proposed mine operations
- Individual subsidence management plans relating to specific properties
- Survey data
- Copies of PMIs that have been conducted by mine operators, prior to a claim being lodged
- Maps of proposed mining activity.

The Review sought feedback on whether the Act should be amended to require mine operators to provide certain types of information to Subsidence Advisory.

The Law Society of NSW agreed with such a requirement in the Act, if there was difficulty obtaining information from mine operators.

Mining industry stakeholders generally disagreed with the suggested requirement, stating current information and documentation provided was sufficient. They noted that mines already prepare reports including subsidence monitoring plans, and subsidence plans for individual properties. However, the Review notes that Subsidence Advisory does not have access to these reports.

Most property owners agreed with strengthening the provision of information requirements in the Act. One property owner suggested that the Chief Executive have the power to take action where a mine operator or Subsidence Advisory itself was found to have withheld information or provided incorrect information.

Internal government feedback suggested that the Act be amended to allow Subsidence Advisory to obtain information and data directly from mine operators.

Including requirements for the compulsory provision of information by mine operators in the Act would allow Subsidence Advisory to obtain data and reports that are important for the overall assessment of mine subsidence within a particular region. This information is also critical in:

- informing development regulation requirements
- claims management, including prior to claims being lodged

¹⁸ CMSC Act, section 49(4).

- community engagement, including notifications issued prior to mining commencing and responses to enquiries from members of the public
- responses to emergency calls.

The Review recommends that the power to require provision of information be expanded to allow Subsidence Advisory to require coal mine operators to provide information and documentation that Subsidence Advisory reasonably requires in relation to the administration of the Act for the processing of future claims and to inform development requirements, including:

- subsidence survey data
- identification of properties where subsidence may impact (within the likely subsidence impact zone)
- subsidence monitoring plans
- individual property subsidence management plans
- proposed longwall mining maps
- current extraction data in a standardised format.

Failure to comply with a requirement for information or documentation should be an offence, similar to section 49(3) and (4).

Provision of this information would assist Subsidence Advisory with carrying out its functions under the Act including managing and determining claims and also supporting customers. It would also improve transparency regarding the evidence base used by Subsidence Advisory when managing and determining claims and regulating development. This also supports the objective of the Act, to providing fair and efficient compensation.

The information would be required to be provided at an interval as determined by Subsidence Advisory.

Recommendation 4

Introduce measures to increase the efficiency of assessments of future claims and inform development requirements by providing for key pieces of information:

- introduce the requirement for pre-mining inspections and make this requirement a pre-requisite for making a claim within the estimated zone of influence in an active mining area
- make the responsibility for carrying out inspections, including pre-mining inspections, to sit exclusively with Subsidence Advisory. The cost of pre-mining inspections will be recovered from the relevant mine operators on a cost recovery basis.
- Subsidence Advisory to have responsibility for determining where the estimated zone of influence is, informed by estimated zones of influence for future mining operations prepared by mine operators
- Subsidence Advisory to have discretion to deal with claims where a pre-mining inspection was required but was not carried out, where Subsidence Advisory determines that there are extenuating circumstances.
- introduce a new power to allow Subsidence Advisory to require information and documentation from coal mine operators, outside of the existing authorised officer powers, where it is reasonably required to inform future assessments and development requirements. Introduce a penalty for coal mine operators' non-compliance with a request for information and documentation under this power, in consultation with the Department of Communities and Justice.

4.2.3 Process of assessing and determining claims

The Act requires the Chief Executive to forward claims relating to compensation arising from an active coal mine to the relevant mine operator.¹⁹ The Act further states that the mine operator to whom a claim has been forwarded, determines the claim for compensation in accordance with the Act.²⁰

However, in practice, mine operators cannot determine claims outside the scope of an independent assessment. Section 13 of the Act requires claims for compensation to be determined in accordance with the [Approved Procedures](#).²¹ The [Approved Procedures](#) specify that Subsidence Advisory arranges assessment of claims, independent of the mine operator.²² The assessor selected by Subsidence Advisory prepares a Claim Evaluation Report. The report details:

- whether the damage is attributable to mine subsidence
- supporting data, such as survey levels and photos
- the scope of works to repair, if applicable
- a cost estimate for the scope of works, if applicable.

¹⁹ CMSC Act, section 12(1)(a).

²⁰ CMSC Act, section 12(7).

²¹ CMSC Act, section 13(1).

²² The approved procedures are made under the CMSC Act, section 14.

The Approved Procedures state that the mine operator must determine the claim in accordance with the Claim Evaluation Report. If the mine operator does not determine the claim in accordance with the Claim Evaluation Report, the Act allows the Chief Executive to step in and determine the claim.²³ The Chief Executive may then recover the compensation amount from the mine operator.²⁴

The issue of independent assessment of claims was raised by property owners during consultation for the Review. Property owners requested that an object of the Act specify that assessment of claims be done by an independent organisation. One property owner requested that the Approved Procedures exclude mine operators from any role in determining claims. The Review notes that claims in active mining areas are already assessed by an independent consultant, rather than the mine operators. However, the Review acknowledges that references in the Act to the mine proprietor having a role in assessing and determining claims has caused confusion among property owners.

Subsidence Advisory has on occasion faced challenges in engaging independent assessors. These include:

- the limited availability of qualified geotechnical engineers, exacerbated by a backlog in the engineering industry due to COVID-19
- competitiveness of the engineering industry and small scale of Subsidence Advisory's assessments compared to large projects
- minimal incentives to complete assessments on time.

These challenges have led to risks of claims not meeting guarantee of service timeframes, as claims are delayed pending confirmation of an available assessor. The Review notes that Subsidence Advisory has the internal capability and qualified experts that could carry out assessments of claims.

The Review recommends that the Act be amended to clarify that mine operators do not determine claims, and the determination of claims must be in accordance with the independent assessor's report. Noting property owner feedback, the Review further recommends that the Act clarify that assessment of claims should be independent of mine operators and that Subsidence Advisory can conduct assessment of claims. This also supports the objective of the Act, to providing fair and efficient compensation.

²³ CMSC Act, section 18.

²⁴ CMSC Act, section 18(3) and (4).

Recommendation 5

Clarify the role of Subsidence Advisory and other persons in relation to the assessment and determination of claims, including that:

- Subsidence Advisory can conduct assessments of claims
- Subsidence Advisory determines all claims
- mine operators do not determine claims for compensation, and that claims should be determined in line with an assessor's report
- the role of independent assessors is independent of mine operators.

4.2.4 Approved Procedures

Expanding the scope of the Approved Procedures

Section 14 of the Act provides for the Chief Executive to approve procedures for the determination of claims under the Act. These Approved Procedures are currently contained in the document '[Guidelines – Process for Claiming Mine Subsidence Compensation](#)' on the Subsidence Advisory website.

The Act requires claims for compensation to be determined in accordance with the Approved Procedures.²⁵ The purpose of the Approved Procedures is to ensure all claims are determined consistently and fairly.

The Chief Executive is required to consult the mine operators before approving, amending or replacing the Approved Procedures (unless the proposed amendment is minor or trivial in nature). The Chief Executive must provide reasonable notice of any amendment to the Approved Procedures before it takes effect.

The Review sought feedback on whether the scope of the Approved Procedures should be extended to additional aspects of the claims process beyond claim determination, including those that occur prior to mining commencing. Examples of such steps include PMIs and claim lodgement.

The Law Society of NSW considered that section 14 already allows for the Approved Procedures to have a broad scope.

Mining industry stakeholders were split on whether section 14 should be amended. Suggested changes from mining industry stakeholders included adding a requirement to the Approved Procedures for PMI and survey installation to be undertaken as a pre-requisite for the making of a claim.

One property owner suggested requiring the Approved Procedures to be an appendix to the Regulation, and that the Act should set out requirements for what the Approved Procedures should contain. The Review notes that this would make the Approved Procedures inflexible and provide an inappropriate level of detail for an Act.

Many stakeholders suggested amendments to the Approved Procedures themselves, however, the content of the Approved Procedures is outside of the scope of the Review of the Act. The Review notes that the Approved Procedures will be reviewed by Subsidence Advisory separately, and feedback on the content of the Approved Procedures will be carried over to that separate review.

²⁵ CMSC Act, section 13.

The Review recommends that the Act be amended to allow the Approved Procedures to expand in scope, to cover the making, assessment and determination of claims. This would include steps that occur prior to mining commencing, and prior to a claim being lodged. This would provide increased clarity for both property owners/claimants and mine operators in relation to the claim process beyond just the determination of claims.

Allowing the Approved Procedures to include a process of revising determinations of claims

The Review sought feedback on whether the dispute resolution process was achieving its aim of providing a no cost-independent review mechanism for claimants and mine operators.

The Law Society of NSW was unaware of issues with the dispute resolution process and noted that the Land and Environment Court (LEC) was the appropriate pathway for appeals.

Mining industry stakeholders generally disagreed that the dispute resolution process was no-cost, noting that section 10.3.1 of the Approved Procedures allows the Secretary to decide on review costs to be paid by the mine operator, the Fund or the claimant. Mining industry stakeholders made the following suggestions:

- section 10.3.1 of the Approved Procedures should be deleted
- compensation amounts should be reviewable at the request of mine operators, and
- the Act should be amended to specify that where a mine operator or a claimant initiates an appeal in the Land and Environment Court, that the other party may join as a respondent.²⁶

A majority of property owners did not agree that the dispute resolution process was achieving its aim of providing a no-cost independent review mechanism, primarily due to the associated legal costs.

The Review notes that feedback relating to content of the Approved Procedures is outside of the scope of this Review and will be carried over to the Approved Procedures review.

The Review considers that the introduction of provisions allowing mine operators to seek Secretary review of compensation amounts determined in response to claims to be inappropriate. Currently, mine operators are able to request a review by the Secretary as to whether the damage suffered was caused by their mine.²⁷ Compensation amounts are based on an independent assessment of costs to repair damage and therefore are less subjective. In addition, allowing mine operators an opportunity to seek Secretary review of compensation amounts would likely result in delays in the making of compensation payments to claimants.

In response to the feedback from both mining industry stakeholders and property owners that the review process is not independent or no-cost, the Review notes that:

- A claimant whose claim for compensation is wholly or partly disallowed can seek an independent no-cost review by the Secretary.²⁸

²⁶ CMSC Act, section 16.

²⁷ CMSC Act, section 12.

²⁸ CMSC Act, section 15.

- A mine operator can seek an independent no-cost review by the Secretary in relation to any determination made by the Chief Executive that the relevant claim relates to the mine operator's coal mine.²⁹

Where the Secretary has reviewed the wholly or partly disallowed claim for compensation at the request of the claimant, either the claimant or mine operator can appeal the Secretary's decision to the LEC.³⁰ Where the Secretary has refused to review a claim in relation to infrastructure, the claimant can appeal directly to the LEC.³¹ The Review notes, however, that while the legal appeal option is independent, it does involve legal costs for both claimants and mine operators.

In order to provide an opportunity to resolve issues with claims without seeking a formal review, the Review recommends amending the Act to allow the Approved Procedures to include a process for revising the determination of claims. This could be based on new information or evidence. The revising of a determination, if requested by either the claimant or mine operator, would occur prior to the Secretary review. This process would provide the claimant and mine operator an additional opportunity to submit further information for reconsideration by Subsidence Advisory at no cost and would seek to limit the matters that are reviewed by the Secretary.

Recommendation 6

Expand the scope of the matters that the Approved Procedures may deal with to include:

- the making, assessment, and determination of claims
- the revision of the determination of a claim
- steps that occur prior to mining commencing and prior to a claim being lodged.

4.2.5 Compliance and enforcement with the Act

The Act provides Subsidence Advisory with compliance and enforcement tools to allow it to effectively oversee and enforce compliance with the Act.

Authorised officers are appointed and tasked with monitoring compliance with the Act and have the powers to carry out necessary inspections, audits and inquiries.³² Offences under the Act may be committed by both individuals and corporations.

The Review sought feedback on whether any additional enforcement tools should be included in the Act. Most stakeholders did not answer this question, however those who did considered the existing enforcement tools sufficient.

The Review also sought feedback on whether offences and penalties in the Act were sufficient to support compliance.

Some property owners considered that penalties for mine operators in the Act were too low and requested higher penalties. Property owners also considered that additional types of penalties should be introduced for mine operators. One property owner

²⁹ CMSC Act, section 12(2).

³⁰ CMSC Act, section 16(2).

³¹ CMSC Act, section 16(1).

³² CMSC Act, Part 6.

suggested a penalty for mine operators who failed to supply all relevant information or concealed/misrepresented information.

The Review also sought feedback on whether penalty levels should be adjusted to take account of inflation, as measured through the Consumer Price Index (CPI). Mine operators did not consider increasing penalties in line with CPI necessary. Most property owners and residents supported increasing penalties in line with CPI.

The Review finds that the existing enforcement tools in the Act are sufficient, although an additional penalty should be included for the strengthened provision of information powers discussed above (**Recommendation 4**). The Review further recommends increasing penalties for the existing offences in the Act, in line with CPI. This is to ensure that the deterrent effect of the penalties is maintained over time.

Recommendation 7

Increase the amount of penalties for existing offences in the Act, to reflect increases in the Consumer Price Index since the commencement of the Act in 2018, ensuring adequate deterrence, in consultation with the Department of Communities and Justice.

4.3 Clarifying the functions of Subsidence Advisory to respond to subsidence impacts and risks

4.3.1 Objects of the Act

The objects of the Act are to provide for:

- a fair, efficient and sustainable compensation framework for dealing with the impacts of coal mine subsidence (section 3(1)), in particular, to provide for:
 - a scheme for the provision of compensation for damage caused by subsidence resulting from coal mine operations (section 3(2)(a))
 - the assessment and management of risks associated with subsidence resulting from coal mine operations (section 3(2)(b)).

The Review sought feedback on whether the objectives of the Act are still valid and whether any other objectives should be included.

The Review notes that most stakeholders considered the current objectives of the Act valid. Both mining industry stakeholders and residents and property owners requested additional objectives in the Act.

Mining industry stakeholders requested an additional objective to enable Subsidence Advisory to prevent development in areas where future mining activity is planned. In response to this feedback, the Review notes that the objects of legislation are not the appropriate place for inclusion of powers. Additionally, the Review notes that Subsidence Advisory is not responsible for land use and zoning or approving and regulating mines, however the Chief Executive does already have the power to grant or refuse to grant approval for an application carry out development in mine subsidence districts.

Property owners requested the following additional objectives:

- expanding what should be compensated, including pain and suffering from dealing with mine subsidence damage and the claims process

- requiring assessment of claims to be done by an independent organisation
- providing free and open access to available information related to mine subsidence.

The primary purpose of the Act is to provide a compensation scheme for damage to property caused by coal mine subsidence. The Review does not consider it to be appropriate to extend the compensation framework to include pain and suffering caused by coal mine subsidence, as they are difficult to objectively assess and determine, and would risk putting untenable pressure on the Fund to the detriment of other claimants.

In response to the request from property owners for claims to be assessed by an independent organisation, the Review notes that Subsidence Advisory is independent from mine operators and claims in active mining areas are assessed by independent consultants.

In response to the feedback requesting free and open access to information, the Review notes that, in accordance with the Approved Procedures, after a claim is lodged, a dedicated Subsidence Advisory Case Advisor is assigned to provide the claimant with a single, responsive point of contact and information throughout the claims process.

The Review also understands that Subsidence Advisory undertakes community engagement with and provides information to residents that are within areas where future mining is planned.

4.3.2 Scope of preventative and mitigative expenses

Definition of preventative and mitigative expenses

A preventative or mitigative expense is defined as *‘an expense incurred or proposed by or on behalf of the owner of an improvement or goods in preventing or mitigating damage to that improvement or those goods arising from subsidence’*.³³

Subsidence Advisory has reported that the current definition of preventative or mitigative expenses has caused confusion for claimants as to whether it relates to expenses associated with existing or future improvements (including buildings and infrastructure) and goods. Several enquiries and a compensation claim have been made to Subsidence Advisory, for costs incurred when complying with development conditions imposed under the Act³⁴ for future building. To minimise uncertainty for claimants, the Review recommends that the definition of preventative or mitigative expenses is amended to clarify that it only relates to expenses incurred or proposed by or on behalf of the owner for an existing improvement or goods, in preventing or mitigating damage arising from subsidence.

Associated expenses from preventative or mitigative works

Under section 29 of the Act, the Chief Executive can spend money from the Fund to pay for works to prevent or mitigate subsidence damage to improvements (including buildings and infrastructure) or goods, if the Chief Executive is satisfied it will reduce the total prospective liability of the Fund.

In some circumstances, Subsidence Advisory may carry out works, including sub-surface mitigation, while a claim is pending, prior to repair works being completed by the

³³ CMSC Act, section 4(1).

³⁴ Development conditions may be imposed by the Chief Executive pursuant section 22 of the CMSC Act.

property owner. This process ensures repairs are not impacted by further subsidence and therefore reduces the liability of the Fund. While mitigative or preventative works are carried out, residents may be required to relocate. However, currently, payment or reimbursement of relocation expenses are not payable under section 29.

The Review sought feedback on whether relocation expenses or other expenses should be included in the funding for preventative or mitigative works.

The Law Society of NSW and property owners agreed that relocation expenses should be included if a resident is required to relocate, and mining industry stakeholders raised no objection to funding such costs.

In relation to other expenses, a property owner suggested that consideration be given to how grouting works are funded. Grouting works are arranged by Subsidence Advisory and paid out of the Fund, which is funded by the levy on mine operators. Grouting works undertaken by Subsidence Advisory as preventative or mitigative measures, or in response to public danger, are paid out of the Fund, which is funded by the levy on mine operators.³⁵

The Review recommends amendment of section 29 to give the Chief Executive discretion to fund reasonable expenses incurred by a property owner associated with the carrying out of preventative or mitigative works, such as temporary relocation expenses.

Recommendation 8

Clarify provisions for preventative and mitigative expenses:

- clarify that 'preventative or mitigative expenses' applies to existing improvements and goods, not future ones
- give the Chief Executive discretion to fund reasonable expenses that may be incurred by a property owner and/or tenant, associated with preventative and mitigative works, such as temporary relocation expenses
- clarify that where the owner of an improvement is paid from the Fund to carry out preventative or mitigative works themselves, any damage from these works is not eligible for compensation.

4.3.3 Additional functions of the Chief Executive

Scope of Chief Executive's power to refuse to grant approvals

The Review notes that the tense used in section 22(7) contains language that is unclear and creates uncertainty.

Section 22(7) stipulates that the Chief Executive may refuse to grant an approval that relates to the alteration or erection of buildings or infrastructure over land, or the subdivision of land, being land that, in the opinion of the Chief Executive, may subside if the coal in the land were extracted by underground methods. It is currently unclear whether the term 'were' refers to coal that may be extracted in the future, or coal that has already been extracted.

The Review notes that this issue was not commented on by stakeholders during the public consultation. However, based on feedback from Subsidence Advisory, the Review recommends amending the drafting of section 22(7) to clarify that the Chief Executive

³⁵ CMSC Act, section 27.

may refuse to grant approval where the Chief Executive is of the opinion that the land may subside:

- as a result of previous extraction of coal from the land, or
- if coal were to be extracted from the land in the future.

This will clarify the scope of the Chief Executive's power and will minimise uncertainty.

Chief Executive's power to sell vacant land

Under section 26(1) of the Act, instead of paying compensation in response to a claim relating to a non-active coal mine, the Chief Executive can agree with the owner of the land or improvement to which the claim relates, to buy the land or improvement. Where this occurs, the Chief Executive can restore the improvement or goods to the condition (as nearly as practicable) that they were in prior to the subsidence damage. The Act specifies that the Chief Executive may sell, lease or otherwise dispose of any property acquired under section 26(1).³⁶

Where a person proposes to build on vacant land, and the land has been or is likely to be adversely affected by subsidence, the Chief Executive may:

- buy the land or an interest in the land, or
- do works on the land to prevent or mitigate the effects of subsidence.³⁷

The Review considers that the terms of section 26(1) currently prevent the Chief Executive from purchasing property damaged by subsidence, demolishing the building or infrastructure, and then selling the vacant land. While the Act states that the Chief Executive may sell, lease or otherwise dispose of any property acquired by the Chief Executive under section 26(1),³⁸ it is not clear if Subsidence Advisory must first comply with the provisions of section 26(1)(b) (to restore the improvement to the condition, as nearly as practicable, that it was in prior to the damage).

It could be costly for Subsidence Advisory to demolish and rebuild a building or infrastructure, such as a house, to the standard required by section 26(1)(b). In some cases, the damage is significant, and this requirement is not practical, nor would it result in a value for money outcome. Subsidence Advisory does not have the operational capacity or functions to directly develop properties in mine subsidence areas. It also does not align with the intention and objects of the Act, which is to compensate persons for the impact of subsidence.

The Review recommends amending the Act to expand the Chief Executive's options for dealing with land or improvements after purchase. In particular, a provision should be included to allow the Chief Executive to demolish improvements where it is not practicable to restore them to the condition they were in before the subsidence occurred in accordance with section 26(1)(b). It should also be made clear that subsections 26(1)(a) and 26(1)(b) both do not have to be satisfied to be prerequisites to the Chief Executive selling, leasing or otherwise disposing of property under section 26(5).

Delegation for the functions in the Act

A primary function of the Secretary is to review determinations made by the Chief Executive. Under the current delegation provisions, the Secretary can delegate this

³⁶ CMSC Act, section 26(5).

³⁷ CMSC Act, section 30.

³⁸ CMSC Act, section 26(5).

power of review to any person employed by the Department, including the Chief Executive, which does not adhere to principles of natural justice as this would result in the Chief Executive reviewing their own decision, being a conflict of interests. The Review recommends that the existing delegation powers are limited to ensure that the Review of Claim Determinations, cannot be delegated to the Chief Executive, or any person employed in Subsidence Advisory.

Recommendation 9

Clarify some elements of the responsibilities of the Chief Executive:

- clarify that the Chief Executive may refuse a development approval in a mine subsidence district for decisions made under the Act, where the Chief Executive is of the opinion that the land may subside as a result of previous extraction of coal from the land, or if coal were to be extracted from the land in the future. Note that development applicants would still be required to obtain the relevant approvals from local and other relevant consent authorities, under other relevant legislative frameworks.
- allow the Chief Executive to demolish improvements, subject to relevant development approvals, on land purchased by the Chief Executive, where it is not practicable to restore damaged improvements or goods to the condition they were in before the subsidence occurred.
- limit the broad delegation powers allowing the Secretary to delegate their functions to any officer in the Department, to ensure review powers are not delegated to the Chief Executive or any person employed in Subsidence Advisory.

4.3.4 Contracting out of the Act

Section 17 of the Act states that the Act applies despite any contract or agreement to the contrary. The Review sought feedback on whether contracting out should be allowed for government agencies who may have responsibilities for the development and operations of large-scale government infrastructure, such as Transport for NSW.

Currently, large-scale government infrastructure is referred to Subsidence Advisory for approval to ensure eligibility for compensation under the Act. Contracting out of the Act would allow work on infrastructure such as roads and hospitals without needing to comply with development conditions imposed by Subsidence Advisory in Mine Subsidence Districts. These government agencies would be responsible for managing the risks of mine subsidence themselves, making them not eligible to claim for compensation under Part 2 of the Act.

Most stakeholders disagreed with allowing contracting out of the Act for government agencies. As a result, the Review recommends that to ensure mine subsidence risks are considered and managed appropriately, section 17 of the Act remains.

4.3.5 Appropriate parties in proceedings in the Land and Environment Court

Either the claimant or mine operator can appeal the decision of the Secretary to the Land and Environment Court (LEC.)³⁹ The Act is unclear as to whether the other party who does not appeal the decision is permitted to join the proceedings as a respondent.

This issue was raised by mining industry stakeholders, who requested that the Act specify that the other party can join the appeal.

The matter of *Tahmoor v Visser* (2022), referred to above, addressed this issue and concluded that it is fair and reasonable for the claimant or mine operator to join the proceedings as a respondent where the other party has initiated an appeal in the LEC on the basis that both parties have an unequivocal interest in the outcome of the appeal. As a result, the Review considers that it is not necessary for the Act to specify that a party can join an appeal in the LEC.

4.4 Maintain the framework for development in mine subsidence districts

Mine Subsidence Districts

Mine Subsidence Districts (MSDs) are a land zoning tool and are proclaimed in areas where there are potential subsidence risks from active or non-active underground coal mining.⁴⁰

Under the Act, certain development within MSDs requires approval from the Chief Executive.⁴¹ The Chief Executive may grant approval, either conditionally or unconditionally, or refuse to grant approval. Conditions attached to an approval may include requirements related to the nature and class of improvements, the height, weight, number of storeys and location of improvements, and the use of certain building materials and construction methods. These requirements help prevent or minimise damage to improvements should mine subsidence occur.

Subsidence Advisory reviews MSDs every five years to ensure they remain appropriate and up to date. As part of this process, consultation may be carried out with other NSW Government departments and local councils, mine operators, industry representatives and property owners. This ensures MSDs continue to align with high-risk areas of potential subsidence damage.

MSDs are publicly available as a planning layer on the ePlanning Spatial Viewer. Using the NSW Planning Portal ePlanning Spatial Viewer, a person can find out:

- if a property is in a MSD
- which Subsidence Advisory development guideline is assigned to the property
- if the property is in an area where underground coal mining has occurred.

The Review sought feedback on the framework for development in MSDs.

³⁹ CMSC Act, section 16(2).

⁴⁰ CMSC Act, section 20. This section provides the power for the Regulation to declare a MSD.

⁴¹ CMSC Act, section 21.

The Law Society of NSW supported 5-yearly reviews of MSDs. Mining industry stakeholders suggested annual reviews of MSDs. They also suggested a staged approach to surface development, where mining and associated subsidence happened first, then development afterwards. This included prohibiting development in areas of MSDs that were not yet developed.

The Review notes that the timing of reviews of MSD boundaries is not a requirement in the Act, however the NSW Government made a commitment to conduct a review after 5 years. Subsidence Advisory is conducting this review of MSDs in 2023. As part of the review a detailed and transparent public consultation process will be conducted with other Government departments, mining industry stakeholders and property owners.

Property owners were split on whether they agreed with how MSDs worked. Their concerns included MSDs not aligning with the boundaries of mining lease boundaries and exploration licence boundaries. One property owner also suggested that Subsidence Advisory should notify landowners in MSDs rather than the mine operator.

The Review notes that Subsidence Advisory does not make decisions in relation to the planning or approval of mines in NSW. Additionally, not all underground coal mining presents the risk of subsidence damage to development. As a result, there are some areas where mining has occurred that Subsidence Advisory does not consider necessary to declare an MSD. This applies to areas where there is limited development and/or the underground mining is unlikely to create subsidence risks.

The Review understands that Subsidence Advisory development regulation is risk-based, ensuring MSDs align with high-risk areas for subsidence related damage, while development approval processes in low-risk areas are streamlined.

Building, purchasing or subdividing in a MSD

As noted above, certain development within MSDs requires approval from the Chief Executive.⁴² The Chief Executive may grant approval subject to conditions. Applications for approval are assessed in accordance with Subsidence Advisory's [Surface Development guidelines](#).

The Review sought suggestions on improvements to the development approval provisions in the Act.

One property owner suggested that costs of complying with Subsidence Advisory development conditions should be paid by mine operators or the NSW Government.

The Review notes that the cost of complying with any condition of development approval from a consent authority such as a local council is typically borne by the applicant of that development approval. Similarly, it is appropriate the cost of complying with Subsidence Advisory conditions be paid by the applicant for development approval in a MSD.

The Review notes that Subsidence Advisory provides streamlined complying development processes for all MSD areas through the application of Surface Development Guidelines. The Guidelines provide design options for residents that do not require costly conditions.

Purchasing a property in a MSD

Under the 1961 Act, section 15B certificates were issued to confirm that a property was constructed in accordance with the MSD development requirements. Section 15C

⁴² CMSC Act, section 22.

certificates were issued to identify if a claim for mine subsidence damage to a property had previously been paid or was pending.

The Law Society of NSW suggested to the Review that the right of a purchaser to cancel a contract for sale (section 23(1)(a)) be removed, since rescission rights were now addressed in a wider context by the vendor disclosure and warranty regime, and also noting that section 15B and 15C certificates under the previous 1961 Act were no longer being issued, making it difficult to determine eligibility to cancel a contract for sale authoritatively.

Although the vendor disclosure and warranty regime requirements in New South Wales may give purchasers a right to rescind the contract for sale if the vendor has carried out contravening development, the Review considers that it remains appropriate to retain section 23(1)(a) for additional assurance and certainty.

The Review also notes that it is generally possible to determine if an improvement or subdivision is in contravention of the development approval provisions of the Act, enabling the purchaser to cancel the contract for sale.

Prospective purchasers can obtain confirmation of development consent issued under the *Environmental Planning and Assessment Act 1979* (NSW), which would include any approval issued by the Chief Executive under the Act, from the vendor or local council during the conveyancing process, prior to contract execution. Investigations can then be carried out by the prospective purchaser to determine if the vendor complied with the approvals. In addition to this, Subsidence Advisory maintains a publicly available register of previously issued section 15B certificates.

Noting the above, the Review recommends that the right of a purchaser to cancel a contract for sale be retained.

Compensation eligibility for improvements in Mine Subsidence Districts

Improvements constructed or altered, or subdivisions made in a MSD in contravention of an approval and attached conditions (referred to as contravening development) are not eligible for compensation should they be damaged by subsidence. However, there are some exceptions. Where the Chief Executive is of the opinion that exceptional circumstances exist, or the improvement is a residential building and the failure to obtain the approval was not the fault of the claimant, the Chief Executive may accept a claim for compensation.⁴³ Protections are afforded to property owners, where through no fault of their own, their home is damaged by subsidence, and they were unaware that their home was built in contravention of the requirements in a MSD. Buildings and structures that were built in an area before it was proclaimed a MSD are automatically eligible for compensation should mine subsidence damage occur.

The Review sought feedback on whether there are any other matters regarding compensation eligibility for damaged improvements within MSDs, that should be considered.

Mining industry stakeholders suggested deleting section 23(2), which allows the Chief Executive to determine a claim be dealt with for a contravening development, as it creates uncertainty for mine operators. They suggested purchasers should conduct due diligence on whether developments were compliant and accept that it would not be eligible for claims if it was contravening.

⁴³ CMSC Act, section 23(2).

One property owner considered that compensation should be paid regardless of whether it is a contravening development.

The Review considers that it is appropriate to retain the existing power of the Chief Executive to allow a claim to be dealt with for a contravening development, for equity reasons. For instance, if a resident occupies a contravening development, but they did not build the contravening development, they should still be allowed to make a claim as the contravening development was not their fault.

The Review recommends that the existing framework for development in Mine Subsidence Districts be retained. The existing framework helps to reduce subsidence risks to structures and protect property owners from subsidence impacts.

5

Appendix

5.1 Appendix A: List of Discussion Paper questions

1. Are the objectives of the Act still valid? Please explain.
2. Are there other objectives that should be included? If so, please identify them and explain why.
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?
4. Do you agree with the types of compensation for mine subsidence damage – (yes/no). If no, what improvements do you suggest?
5. Do you think certain types of compensation should be extended to tenants of a property?
6. Do you have any comments on the viability of the compensation fund and suggestions for other mechanisms/ actions?
7. Do you think that the current requirements for making a claim of compensation are appropriate?
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?
9. Do you think the Act should be amended to specify requirements for certain types of information from mine operators?
10. Is the Dispute Resolution process achieving its aim of providing a no-cost independent review mechanism?
11. Should contracting out of the Act be considered for government agencies such as Transport for NSW?
12. Do you have any comment about mine subsidence districts and how it works?
13. Do you suggest any improvements to the approval provisions under the Act?
14. Are there any matters regarding compensation eligibility of structures within Mine Subsidence Districts, that you think should be considered?
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?
16. Are there any matters such as expenses that should be included in the funding of preventative works, for example relocation expenses?
17. Do you think the additional functions of the Chief Executive are working well? If, 'no', what improvements would you suggest and why?
18. Are there any other functions that the Chief Executive should have? If yes, what are they?
19. Are there any other enforcement tools, which should be included in the Act to ensure compliance?
20. Do the offences and penalties appropriately support compliance with the Act's objectives?
21. Should the penalty levels be adjusted to take account of increases in Consumer Price Index since the Act's enactment in 2018?
22. Do you have any comments on these other matters included in the Act?
23. Are there other provisions or improvements, which may be necessary to assist in meeting the objectives of the Act?
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?

5.2 Appendix B: List of stakeholder submissions

#	Name/Organisation	Stakeholder type
1	Law Society of NSW	Legal
2	<i>Anonymous submission</i>	Mining industry
3	South32	Mining industry
4	Tahmoor Coal Pty Ltd	Mining industry
5	Samuel Davis	Property owner or resident
6	Kathryn Pesic	Property owner or resident
7	<i>Anonymous submission</i>	Property owner or resident
8	<i>Anonymous submission</i>	Property owner or resident
9	<i>Anonymous submission</i>	Property owner or resident
10	Steve Baker	Legal

5.3 Appendix C: Public consultation process

Public consultation on the *Coal Mine Subsidence Compensation Act 2017* took place over nine weeks from 22 November 2022 to 23 January 2023. Responses to the consultation were made via a written submission to the Discussion Paper or an online survey.

The Department received 10 submissions and 12 survey responses. The Review considered all the submissions and survey responses made during consultation.

Stakeholder type	Number of responses	Percentage of stakeholders
Property owner or resident	14	61%
Mine operator, Mining industry organisation	3	13%
Other	3	13%
Legal	2	9%
Government agency	1	4%

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