

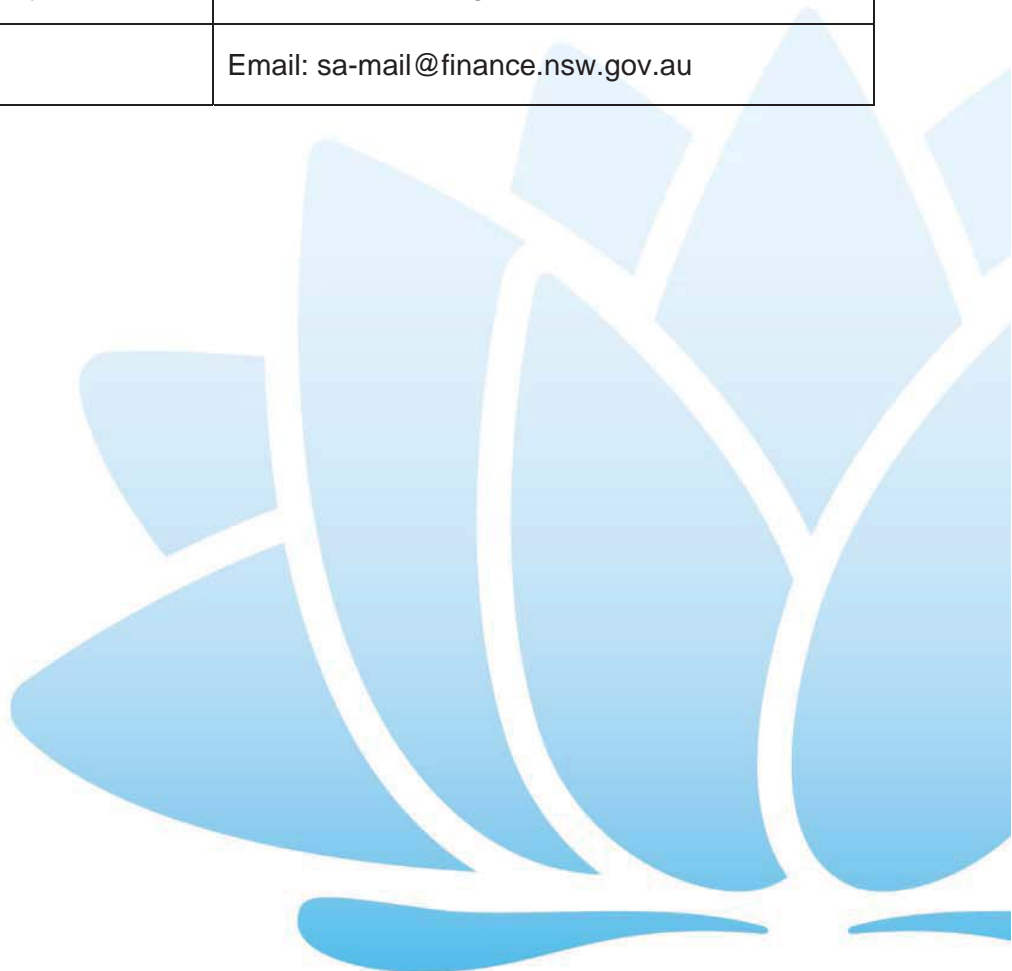


# Policy to support determinations under section 23(2) of the *Coal Mine Subsidence Compensation Act 2017*

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# 1. Introduction

## 1.1 Role of Subsidence Advisory NSW

Subsidence Advisory NSW (**SA NSW**) is a division of the Department of Finance, Services and Innovation, responsible for administering the *Coal Mine Subsidence Compensation Act 2017* (**the Act**).

SA NSW has three primary functions:

1. to manage claims for compensation under the Act for damage caused by subsidence resulting from coal mine operations in NSW.
2. to regulate certain development within mine subsidence districts to mitigate risks associated with mine subsidence.
3. to manage risks associated with mine subsidence, including raising public awareness of mine subsidence.

## 2. Policy Statement

### 2.1 Objectives

Section 23(1)(b) of the Act provides that if an improvement has been erected or altered or a subdivision has been made within a mine subsidence district in contravention of Part 3 of the Act, a claim for compensation for damage arising out of subsidence is not to be dealt with and payment is not to be made under the Act in relation to the contravening improvement or contravening subdivision.

Notwithstanding this, the Chief Executive of SA NSW may determine, in accordance with section 23(2), that a claim relating to a contravening improvement or contravening subdivision may be dealt with or a payment may be made in certain circumstances.

The key objective of this policy is to provide guidance to support a determination under section 23(2) of the Act, including:

- circumstances where a claim may be dealt with, or a payment may be made, in respect of a contravening improvement or contravening subdivision
- factors that may justify that there are exceptional circumstances.

### 2.2 Scope

This policy applies to all officers, consultants, contractors and outsourced service providers performing work relating to determining claims made under section 23 of the Act, for the Department of Finance, Services and Innovation.

### 2.3 Ethical Conduct

All activities must be conducted in an ethical and transparent manner and comply with the values, principles and articles in the Code of Conduct.

Staff will ensure that they are not, or are not perceived to be, in a conflict of interest with any claimant that is seeking recourse under the Act. Those staff who have, or may be perceived to have, a conflict of interest in the outcome of a decision should disclose any conflict, including any perceived conflict, to their manager and discuss whether they should exclude themselves from any role involved in the consideration or determination of matters under the Act.

## 3. Matters informing determinations under section 23(2) of the Act

### 3.1 Overview of section 23(2)

The Chief Executive of SA NSW may determine, in accordance with section 23(2) of the Act, that a claim for compensation for damage arising out of subsidence in respect of any contravening improvement or contravening subdivision, may be dealt with or a payment may be made, in relation to the following:

- a) an improvement that is a residential building, if the Chief Executive is of the opinion that:
  - (i) the failure to obtain the approval was not the fault of the claimant, or
  - (ii) exceptional circumstances exist,
- b) an improvement that is not a residential building, if the Chief Executive is of the opinion that exceptional circumstances exist.

### 3.2 Failure to obtain approval is not the fault of the claimant

The following scenarios are possible examples of where failure to obtain approval under Part 3 of the Act, may be considered as not the fault of the claimant.

However, these examples do not purport to limit the Chief Executive's discretion under section 23(2), and in particular, this does not warrant that any determinations will be made in favour of dealing with a claim or making a payment under the Act. Each claim will be assessed on its own facts and merits.

For example:

- a) the claimant exercised due diligence at the time of purchase of the land, but was not made aware of the contravening improvement or contravening subdivision, i.e. reasonably sought evidence of approval under Part 3 of the Act from vendor or Council but due to an error, omission or malfeasance was not made aware of the contravening improvement or contravening subdivision.
- b) the claimant lodged a development application / complying development certificate with Council or Certifying Authority and the applicant was not forwarded to SA NSW.
- c) the claimant lodged a development application, received approval, and obtained a construction certificate, but the building was not constructed in accordance with the relevant approvals and was inappropriately certified.

Note: The above examples are not an exhaustive list.

### 3.3 Exceptional circumstances

The following scenarios are possible examples that may be considered as being exceptional circumstances which may justify dealing with a claim or making payment under the Act in relation to compensation for damage arising out of subsidence in respect of a contravening improvement or contravening subdivision.

However, these examples do not purport to limit the Chief Executive's discretion under section 23(2) of the Act, and in particular, this does not warrant that any determinations will be made in favour of dealing with a claim or making a payment under the Act. Each claim will be assessed on its own facts and merits.

For example:

- a) the claimant demonstrates that he/she made all reasonable endeavours to ensure that approvals under Part 3 of the Act were obtained prior to the improvement being erected or altered or the subdivision being made, and did not knowingly undertake the contravening improvement or contravening subdivision without having received the relevant approvals under Part 3 of the Act.
- b) the claimant demonstrates that he/she made all reasonable endeavours to ensure that approvals under Part 3 of the Act were in place at the time of purchase of the land.

However, if the claimant was aware, or should have reasonably been aware, that the contravening improvement or contravening subdivision was being undertaken, or had been undertaken, without the relevant approvals under Part 3 of the Act, these matters will be a relevant consideration for any determination that is made under section 23(2) of the Act.

Note: The above examples are not an exhaustive list.

### 3.4 Determination

SA NSW will notify the relevant claimant of the determination made under section 23(2), including a written summary of the reasons for the decision.

## 4. Related Policies and Documents

Issuer	Reference	Document Name
NSW Government	No 37 of 2017	<i>Coal Mine Subsidence Compensation Act 2017</i>
Department of Finance, Services and Innovation	Feb 2005	Code of Conduct
Subsidence Advisory NSW	April 2018	Guidelines – Process for claiming mine subsidence compensation
Subsidence Advisory NSW	May 2018	Residential Claims Management Procedure

## 5. Document Control

### 5.1 Document Approval

Name & Position	Signature	Date
Joseph D'Ermilio, Director (CEO) Subsidence Advisory		26 March 2019

### 5.2 Document Version Control

Version	Status	Date	Prepared By	Comments
0.1	Draft	24 May 2018	Brendan Killen	
1.0	Final	21 March 2019	DFSI Legal	

### 5.3 Review Date

This policy will be reviewed in March 2020.

It may be reviewed earlier in response to post-implementation feedback from Business Units.