DRAFT SECOND READING SPEECH

HON. M. T. (RENE) HIDDING MP

Neighbourhood Disputes About Plants Bill 2017

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I move that the Bill now be read for a second time.

The Government is pleased to introduce the *Neighbourhood Disputes about Plants Bill* into the Parliament. The Bill is an initiative of the Attorney-General and it delivers on the government's commitment to introduce a cost effective, efficient and accessible statutory scheme for the resolution of neighbourhood disputes relating to plants.

A neighbour's trees may block sunlight or views and may also cause physical damage, for example by tree roots that damage a neighbour's drainage system or driveway, or in cases where there is encroachment, such as overhanging tree branches. In general, neighbours are able to deal with issues or disputes that arise in relation to problem trees, hedges or other vegetation in a reasonable and amicable manner. There are circumstances, however, where such disputes may be unresolvable and in the absence of a satisfactory solution, anger and frustration between neighbours may become entrenched.

Disputes about the impact of trees and hedges on neighbouring property were raised with the Attorney-General by constituents in her electorate of Pembroke. In 2012 the Legislative Council passed a motion moved by the Member for Pembroke, noting the problem caused by trees or hedges which obstruct the views or sunlight of neighbouring residents and the lack of redress available to the person whose views or sunlight are restricted.

The matter was subsequently referred to the Tasmania Law Reform Institute (TLRI) for its consideration. In January 2016 the TLRI released its Final Report No 21, *Problem Trees and Hedges: Access to Sunlight and Views* (the Report).

The Report notes that the law of private nuisance does not recognise a view or access to light as something that should be protected and its application is limited to cases where a neighbour's tree causes physical damage to the land or encroaches onto the neighbouring land. The TLRI is of the opinion that "the loss of sunlight or a view (or both) can have serious negative consequences for those affected" and that because of this intervention is justified.

The Report notes that discord between neighbours can disrupt a whole community and that the lack of a legal solution may result in a person affected taking potentially illegal action to resolve the situation.

The TLRI made a number of recommendations about the content of a statutory scheme, the majority of which have been adopted in this Bill. While the Report focussed on the obstruction caused by trees or hedges to sunlight or a view, it was considered sensible for the statutory scheme to also address matters that would otherwise be dealt with under a common law nuisance.

Similar schemes in other Australasian jurisdictions provide for the resolution of neighbourhood disputes relating to vegetation. In particular, New South Wales *(Trees (Disputes between Neighbours) Act 2006*, Queensland *(Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (the Queensland Act) and New Zealand (*Property Law Act 2007* - Part 6, subpart 4) have introduced statutory schemes to resolve such disputes. The Bill largely models the provisions of the Queensland Act.

On 14 October 2016, a consultation draft of the Bill was released for public comment and sent to government agencies, local government, the legal profession and the wider community. The Bill generated much public interest and approximately 50 submissions were received from stakeholders.

Almost all submissions were either strongly supportive of the proposed legislation or supported the legislation more broadly but proposed changes to the scope of the scheme. Many of the issues raised in consultation have been addressed in the final Bill.

The key features of the Bill are that it:

- defines key terms, including owner, affected land and who is a party in relation to an application;
- specifies which plants are covered by the Bill and those which are not;
- outlines the rights and responsibilities of land owners in respect to vegetation;
- restates the Common Law right of abatement;
- provides for the Resource Management and Planning Appeal Tribunal (RMPAT) to have jurisdiction to hear and determine disputes;
- provides a threshold test for determining the circumstances in which an affected landholder may have redress under the scheme
- encourages informal dispute resolution before formal dispute resolution where possible;
- outlines the informal and formal dispute resolution processes;
- lists a range of orders which may be imposed by the Tribunal; and
- provides for various other miscellaneous matter.

The Bill lists those entities which are deemed to be land owners, and who therefore may have responsibility for a plant.

In most cases, the specified categories of land owners will have an exclusive right to occupy the land and it is appropriate that they should have responsibility for plants that are situated on the land which they occupy. It is important to note however, that tenants under the *Residential Tenancy Act*, will not have responsibility for plants under the provisions of the Bill. That responsibility will rest with the owner of the land.

In respect to the category of licence holders of Crown land, only licence holders who have a right to occupy the land or those who have specific responsibility for the management of plants on the land in question will have responsibility for plants under the Bill.

The Bill also does not apply to plants that are situated on land that is defined as excluded land. This includes:

- public parks, gardens, reserves, conservation areas and public open space that is owned or managed by local councils;

- rail network land;
- strategic infrastructure corridors;
- land that is located within Wellington Park;
- state highway and local highway land;
- unalienated Crown Land;
- reserved land under the *Nature Conservation Act*, this includes national parks and other reserves;
- land that is reserved under the *Crown Lands Act* or reserved for a public purpose under another Act;
- land that is owned by the Forestry Corporation, permanent timber production zones or other timber production land; and
- other land that is prescribed.

There are a number of reasons why these categories of land have been excluded under the Bill. In the first instance these excluded categories are more likely to capture large parcels of land that are located in rural or remote locations, the land is often unoccupied, or it may have high conservation value or serve some other kind of public purpose or be of benefit to the broader community.

It should also be noted that these exclusions are largely consistent with the type of land that is excluded under the *Boundary Fences Act* and under similar laws in Queensland and New South Wales.

To ensure that the rights of primary producers are not limited by this Bill, the Bill also does not apply to a plant that is planted or maintained for the purpose of sale, or that is located on a farm for a purpose that is necessary or desirable for the management or operation of the farm. The reasoning behind the exclusion of these types of land is that the statutory scheme should not impose an unreasonable burden on people who are trying to make a living.

Plants that are planted or maintained under an order of a court or tribunal are also excluded from the scope of the Bill.

In relation to live boundary fences, these types of disputes will continue to be dealt with under the *Boundary Fences Act*. A consequential amendment has been made to section 48 of that Act to clarify that live boundary fences that are the subject of disputes between neighbours may be dealt with in accordance with the provisions of that section.

The Bill outlines the responsibilities of land owners in respect to plants. This includes:

- severing and removing any branches of the plant that overhang another area of land;
- ensuring that a plant does not cause serious injury to a person or another area of land;
- ensuring that a plant does not cause serious damage to another area of land or any property on land; and
- ensuring that a plant does not cause substantial, ongoing and unreasonable interference with the use and enjoyment of another area of land.

The intention of this provision is to provide a clear set of rules around the responsibilities of land owners and to help land owners and affected neighbours resolve any issues about a tree before a dispute arises. It does not however, create a separate cause of action at law.

Another important principle which is reinforced by the legislation is the restatement of the Common Law right of abatement. This Common Law right of abatement provides that a property owner whose rights have been infringed may seek to rely on the self-help remedy of abatement. This remedy allows the affected property owner to cut any branches that encroach onto his or her property and to return them to the owner, or to enter the property on which the infringement is occurring and remedy the situation.

An important variation to this Common Law right which is made by the Bill is that the owner has the option of returning or keeping the cut branches.

A key feature of the Bill is that the Resource Management and Planning Appeal Tribunal will have jurisdiction to hear and determine disputes. This provision is in line with the recommendations of the TLRI and recognises that the Tribunal is best placed to perform the function given the existing expertise and knowledge of its members and its structure.

As the resolution of disputes will be determined by RMPAT, the majority of the provisions of the *Resource Management and Planning Appeal Tribunal Act 1993* will continue to apply, except where specific provisions are detailed in the Bill.

For example, the provisions under the *Resource Management and Planning Appeal Tribunal Act* that apply to representation, appeal rights, mediation, conferencing, the establishment and composition of the Tribunal and most procedural matters, will also apply for the purposes of the Bill.

An important feature of the legislation is the threshold test which determines when an affected landholder may be entitled to redress against the owner of the plant. Under the proposed scheme an affected landholder may be entitled to redress in the following circumstances.

- Where branches of the plant overhang the affected land; or

- Where the plant has caused, is causing or is likely within the next 12 months to cause, serious injury to a person on the affected land, serious damage to the affected land or property on that land, or substantial, ongoing and unreasonable interference with the use and enjoyment by a person of that land.

There is no requirement that the affected land must directly adjoin the land on which the plant is situated, provided that certain conditions are met.

As the Bill is intended to cover disputes affecting neighbours, the plant must be situated within 25 metres of the affected land. This provision recognises that in some cases tree roots can extend horizontally to a distance of up to 25 metres.
It should be noted however, that this 25 metre rule does not apply in respect to the loss of sunlight and views.

The Bill clarifies that substantial, ongoing and unreasonable interference with the use and enjoyment of affected land may be caused if sunlight to a window of a building or a solar panel or skylight on a roof of a building is severely obstructed.

Substantial, ongoing and unreasonable interference may also be caused if a view from a dwelling on the affected land is severely obstructed. An additional requirement in respect to views is that

the plant must be at least 2.5 metres high and the view must have existed when the owner took possession of the affected land.

Redress will not be available if the obstruction to views or sunlight does not amount to a 'severe obstruction'. The threshold test relating to 'severe obstruction' is used in both the Queensland and New South Wales Acts and is consistent with the recommendation made by the TLRI.

The phrase 'view' is not defined in the Bill or in the New South Wales or Queensland Acts and should be given its ordinary meaning.

However, the Tribunal is specifically required to consider a range of factors when assessing whether there is a severe obstruction to a view, including the nature and extent of the view that is obscured, and the uses to which the part of the dwelling is put.

A substantial body of law has developed around the use of these phrases in Queensland and New South Wales.

In respect to whether there is a severe obstruction of sunlight, the Tribunal is specifically required under the Bill to consider a range of factors, including the amount of sunlight obstructed by the plant, the number of hours per day during which the sunlight is obstructed, the period of year during which sunlight is obstructed, and whether the plant loses its leaves at certain times of the year and the proportion of the year during which leaves are lost.

Plain-English guidance material and practice directions will be developed by the Tribunal to provide further assistance to members of the general public who wish to use the new scheme.

Importantly, and because it is desirable to have friendly, peaceful and cohesive local communities, the Bill includes a number of provisions which are designed to encourage neighbours to attempt to resolve disputes by informal means before going down the path of more formal dispute resolution.

The Bill outlines the steps for parties to try and resolve the situation informally before proceeding to formal dispute resolution.

Before hearing an application under the Bill, the Tribunal is required to consider whether reasonable attempts have been made by the relevant parties to resolve the matter through any of these informal dispute resolution processes. If an owner of the plant is concerned that the proposed work may affect the health or structural stability of the plant or the safety of land or persons on the land, the Tribunal may take this into account.

If the Tribunal is not satisfied that reasonable attempts have been made to resolve the matter, the Tribunal may direct the parties to attempt to resolve matter under the provisions of the Bill or under the mediation provisions of section 16A or the conferencing provisions of section 17 of the *Resource Management and Planning Appeal Tribunal Act.*

The Bill sets out a limited number of exceptions to this rule. This includes where there have been threats of violence made to any of the parties, where there is a court or tribunal order which restrains particular types of behaviour or when the parties have already participated in some form of alternative dispute resolution in relation to the matter.

Where the informal dispute resolution process has failed or is otherwise not applicable because of the exceptions provided for in the Bill, the Bill sets out a formal dispute resolution process.

This includes a requirement for applications to be made in writing, to set out the grounds of the application and to contain sufficient information to enable the offending plant to be identified, a requirement to set out the type of relief that is sought by the applicant, details of the persons or bodies whom the applicant intends to notify and details of the type of consent or approval that would be required from a government body, where applicable.

The applicant must also give written notice of an application to the owner of the land where the plant is situated, any interested government body that is entitled to appear and any other person who would be affected if the relief were granted.

If the applicant fails to accurately identify which parties should be notified, the Tribunal may notify the relevant party. This mechanism is designed to ensure that all interested parties including interested government bodies will be advised of the matter and can be made a party to the proceedings where this is appropriate.

The Bill also provides that an application is to be accompanied by a fee, if one is prescribed. The fee is expected to be consistent with the current fees for lodging an appeal with the Tribunal for various other matters and is currently set at approximately $318.

If the Chairperson believes that paying the fee may cause financial hardship to a person, the Chairperson may waive, reduce or refund all or part of the fee. These features will ensure that the scheme is accessible to the broader public.

For the purpose of determining an application, the Tribunal is required to consider a range of factors if they are relevant to the application in question. This includes the relevant planning scheme, and in particular any provisions relating to the zone, any designation and requirements that apply to plants, and any height restrictions or set back requirements that apply under that scheme.

The Tribunal is also required to consider the plant's location, any risks associated with soil instability or changes to the water table that might be caused by the proposed work, whether the plant or any risk, obstruction or interference previously existed, whether the work would require any consent or other authorisation under another Act, the type of plant in question, the contribution the plant makes to the amenity of the land, including privacy, protection from the sun, wind, noise odour or smoke, contribution to landscape or garden design, any risk associated with the plant due to weather and the likely effect of pruning the plant.

As mentioned previously, the Tribunal is also required to consider certain additional matters in respect to the loss of sunlight and views.

The Bill further specifies a range of matters that may be considered by the Tribunal if there is a threat of serious injury or damage, or if there is substantial, ongoing and unreasonable interference caused by a plant.

In order to clarify how other laws relating to plants should be dealt with, the Bill does not authorise any work that would otherwise be unlawful under another Act or limit the operation

of another law which requires consent or authorisation to be obtained before the work can be carried out.

In some cases, planning schemes established under the *Land Use Planning and Approvals Act* provide that a permit is required before any work can be undertaken on plants. Parties who are seeking redress under the Bill will be required to obtain the relevant permit from the planning authority in the first instance, or if the permit has not been obtained when the matter comes before the Tribunal, the Tribunal may put a stay on proceedings in order to enable the relevant permit to be obtained.

In this way, the Bill retains the current policy settings for decision making under other legislative regimes, including notification and rights of appeal.

If the Tribunal decides that it is appropriate to make orders in relation to an application, the Tribunal may make orders in relation to a plant for any of the following purposes:

- to ensure that a part of a plant does not overhang another person's land;
- to prevent or reduce the likelihood of a serious injury being caused to a person;
- to prevent, restrain or reduce the likelihood of serious damage being caused by a plant to land or property;
- to prevent or reduce the likelihood of substantial, ongoing and unreasonable interference with a person's use and enjoyment of the land; or
- to remedy damage caused to a person's land or any property on that land by a plant.

The Tribunal may also make orders to do any of the following things:

- require or allow an owner of a plant or affected landowner to carry out work on the plant on a particular occasion, or on an ongoing basis if this is considered appropriate;
- require a survey to be undertaken to clarify the location of the plant;
- require a person to apply for a consent or other authority in relation to the plant from the relevant government body;
- authorise a person to enter land to carry out an order, including for the purpose of obtaining a quote for the work;
- require the applicant or owner of the plant to pay costs associated with carrying out an order;
- require the owner of the plant to pay compensation to an affected landholder for damage; or
- require a report to be obtained from a qualified arborist.

Because the Bill recognises the value which is placed on plants by the broader community, the Bill clarifies that an order that requires the removal or destruction of a living plant is not to be made by the Tribunal, unless the Tribunal is satisfied that the purpose of the application could not be obtained in another way. Essentially, this provision recognises that the removal or destruction of a plant should occur as a last resort.

The Bill also makes provision for a range of other matters. These include a power for the Tribunal to make interim orders to enable work to be carried out in relation to a plant. These types of interim orders are only intended to be used in emergency situations where there is an immediate risk of injury to persons or property.

Orders made under the Bill will be binding on the person who is the owner of the land on which the plant is situated at the time that the application is dealt with by Tribunal.

In addition to this, applications and orders will also be binding on a purchaser of land, if the purchaser of the land is given a copy of the application or order by the seller of the land before entering a contract of sale. If the prospective purchaser is not given a copy of the order, the original owner of the land on which the plant is situated remains liable to perform any outstanding work required by the order.

Councils will also be advised of any orders that are made under the Bill and a consequential amendment will be made to the *Local Government (General) Regulations* to ensure that information certificates which are provided to prospective purchasers by councils under section 337 of the *Local Government Act 1993* include information about orders made in respect to plants.

These provisions will ensure that prospective purchasers of land on which problem plants are situated are aware that matters relating to plants may need to be dealt with in the future. This will also ensure that landholders who are affected by a plant will not, in most cases, be required to seek fresh orders if the owner of the plant fails to fulfil his or her obligations under the order before selling the property.

Provisions are also included in the Bill to allow an affected land holder or a plant owner to apply for a variation of an order. The Tribunal may also revoke an order that it considers has been satisfied, on its own initiative or on application by a party.

So that affected land holders are not required to continuously expend time and money in relation to ongoing orders, these orders will generally last for 10 years from the day on which the order is made. The Bill also allows the Tribunal to choose a longer or shorter period, if the Tribunal considers that it is appropriate to do so in the circumstances.

In order to ensure that relevant information is accessible to the broader community, a publicly available database containing details of orders and applications will be established and maintained under the Bill by the Tribunal. Details of the order will include the terms of the order, when the order takes effect, when any work is required to be carried out and who is required to carry out the work.

The Government is confident that the provisions of the Bill strike the right balance between the interests of plant owners and their neighbours who are affected by their plants. Most importantly, the Bill will provide welcome relief for many members of the community who have intractable disputes over plants with their neighbours.

An independent review provision has been included to make sure that the legislation achieves the desired aim of establishing a cost effective, efficient and accessible statutory scheme for resolving disputes between neighbourhoods about plants.

I commend the Bill to the House.