

Practice Direction 18: Applications under the *Neighbourhood Disputes About Plants Act 2017*

Overview/General:

This Practice Direction is a guide to completing the application forms related to the *Neighbourhood Disputes About Plants Act 2017*. It provides information about the process of an application through the Appeal Tribunal.

There are 3 types of applications under the *Neighbourhood Disputes About Plants Act 2017*.

1. An Application under Section 23 seeking orders from the Tribunal related to Affected Land.
2. An Application under Section 36 to Vary or Revoke an order.
3. An Application under Section 37(4) to search the Tribunal's Database of Orders.

PD 18.1. Making an application under Section 23 of the *Neighbourhood Disputes About Plants Act 2017*.

You need to consider the following when making an application under the Act. The form which you need to complete in making an application sets out these issues to be addressed.

18.1.1 Are you a person who can make an application?

Section 23 states that only a "landholder of affected land" can apply to the Tribunal.

To be a landholder you must be the owner or an occupier of the affected land.

An owner is defined in Section 3(1).

An occupier is defined in Section 3(1). If you are an occupier, you must have written to the owner asking them to make an application under this Act. The owner must have refused or failed to reply within 42 days.

The Tribunal application form will require you to include evidence demonstrating this has been done.

18.1.2 Is the Land and/or Vegetation, the subject of your application, excluded from the operation of the Act?

Some types of land or vegetation cannot be the subject of an application under this Act.

Section 9 of the Act sets out the types of land which are excluded from the operation of the Act.

Section 5 of the Act sets out the plants which are excluded from the operation of the Act.

It is important you check these categories to ensure your application is valid.

18.1.3 How is your land affected and do you have all the details of the properties involved?

Section 7 of the Act sets out when land is affected by a plant.

You should first specify which part of Section 7 you are relying upon. This requires you to specifically identify which subsections of Section 7 you claim are relevant.

For example: If your concern is in relation to a loss of view from a dwelling, you would identify Section 7(1)(b)(iii) and provide information about the alleged loss of view and how the plant or plants are affecting the land in more detail.

It is important to note that some of the categories under Section 7 have limits or requirements.

For example, in relation to a loss of view, Section 7(3) sets out a series of requirements that have to be met, before a loss of view can be considered under the Act. Those requirements include: the plant must be at least 2.5 metres high; the plant must cause the view to be severely obstructed; and the person is an owner of the land and the view from the dwelling was not so obstructed when the person took possession of the affected land.

The Tribunal cannot give you legal advice as to whether your circumstances meet the requirements of the Act. You may need to take private advice from a suitably qualified person if you are unsure if your circumstances allow you to make an application.

You are also required to clearly identify the parcel of land (or parcels of land if the plant is located on several titles) where the plant is located. This will mean providing details of the street address and copies of the Certificate of Titles of all parcels of land involved in the application.

18.1.4 What orders are you seeking from the Tribunal?

The orders you need from the Tribunal need to be clearly explained and within the power of the Tribunal to make. Importantly, there are two issues to consider when deciding on the orders you are seeking from the Tribunal.

1. What kind of orders can the Tribunal make? That information is set out in Section 33 of the Act.
2. Whether the orders you are seeking require approval from another government body. Sometimes plants are protected under other legislation, such as planning scheme provisions for example. It may be that removing or modifying a plant might require approval from a Government Body such as a Planning Authority. You can contact TasWater directly to search whether land, the subject of an application, contains any infrastructure. TasWater website [link](#). You will need to identify in your application whether an order would require approval

from another government body. That will affect how the application is processed by the Tribunal.

18.1.5 Interim Order:

An interim order is an urgent form of order which is made without having completed a full hearing process. It is only made where there is an imminent risk of injury to persons or property.

If you are seeking an Interim Order under Section 33(4) of the Act, you will need to complete the relevant section of the Application Form.

You are also required to produce evidence which satisfies the Tribunal there is an immediate risk of injury to persons or property.

The Tribunal may require a person seeking an Interim Order to give an Undertaking as to compensating the other party for any loss or damages as a result of making an Interim Order, if after fully hearing the matter, the Interim Order ought not to have been made. You will be advised if an Undertaking is required.

18.1.6. Who must be notified of this application?

Section 24 of the Act says that you are to notify certain people or government bodies of your application. It includes the person who is the owner of the land on which the plant is situated which is the subject of the application; any interested government bodies under Section 27 and any other person whose interests would be affected if the orders you are seeking were granted.

You need to identify those persons on your application form and you will be required to give them written notice of it (with a copy of the application – See PD 18.2.6) once the Tribunal has initially assessed your application and set a date for a Preliminary Conference. Service of the application upon the Respondent/s should be completed seven (7) days before the Preliminary Conference date.

18.1.7 Have you attempted to resolve this problem with the owner of the land on which the plant or plants are located?

The Act requires that parties have made a reasonable attempt to resolve the dispute between themselves before making an application to the Tribunal.

The Tribunal's form will include a section which requires you to provide evidence that there has been a reasonable attempt made to resolve the dispute. The form will give you direction as to the type of evidence that can be used.

This will assist the Tribunal in determining whether further mediation is appropriate or required.

18.1.8 Have you provided all the information that the application requires?

The Tribunal will require sufficient evidence to demonstrate a prima facie case. The Tribunal will not initiate proceedings without sufficient evidence accompanying an application.

A checklist is provided on the form which sets out all the material you need to include with your application.

These are:

- Evidence which demonstrates the relevant allegations in the application:

For example:

- If it is alleged a plant overhangs affected land, evidence to demonstrate that allegation such as photographs, survey plans or other material.
- If it is alleged a plant has or is likely to cause serious injury or serious damage, evidence to demonstrate the injury caused, or risk assessment evidence by a suitably qualified person to demonstrate the risk of serious injury or serious damage. (PLEASE NOTE: if you intend to use risk assessment evidence in your application, the person who produces that risk assessment must include the full methodology used in making the risk assessment.)
- If it is alleged there is a substantial, ongoing and unreasonable interference with the use and enjoyment of the affected land, evidence which demonstrates the interference and meets the standards set out in the Act.

eg. if you are alleging a substantial, ongoing and unreasonable interference as a result of a view being obstructed, you must provide evidence of that obstruction and that you meet the requirements of Section 7(3) in order to commence the application.

eg. If you are alleging a substantial, ongoing and unreasonable interference as a result of overshadowing, you must provide evidence of the overshadowing such as shadow diagrams prepared by suitably qualified persons.

Please note the evidence which is filed in support of an application must be in affidavit or statutory declaration format. If it is evidence provided by an expert witness, they should be provided with Appendix 12A of the Tribunal's Practice Directions and prepare any evidence in accordance with those requirements (See Clause 5 in particular).

- Copies of Certificates of Title of the Affected Land and the Parcel or Parcels of Land where the plant or plants are located. This can be obtained online from The List or in person from Service Tasmania.
- If you are an Occupier, evidence that you have written to the Owner of the Affected Land seeking them to make an application and their refusal, or evidence they have not replied in 42 days.

- Information/Evidence which identifies the Affected Land as the Plants which are the subject of the application (such as type, scale and height of the plants).
- Information or Evidence demonstrating that reasonable attempts to resolve the dispute have been attempted by the parties before lodging the application.
- A list of persons or government bodies that must be notified of the Application and confirmation you have sent them a copy of the completed application. These details must include their names and addresses and method you have used to notify them of the Application.
- If you are seeking an INTERIM ORDER – you must also provide evidence to satisfy the Tribunal there is an immediate risk of injury to person or property.

PD 18.2 Filing The Application

18.2.1. Where do I lodge the Application?

The application needs to be lodged with the Registry of the Resource Management and Planning Appeal Tribunal. It can be:

- Lodged in person at the Tribunal – Level 6, 144 Macquarie Street, Hobart
- emailed to the Registry (rmpat@justice.tas.gov.au); or
- posted to GPO Box 2036, Hobart 7001.

18.2.2 How many copies do I need to file?

When lodging your application at the Tribunal you must provide sufficient copies for each of the parties to the proceedings. You will be required to serve a copy of the application once the Tribunal has endorsed it.

The number of copies will be a minimum of 3 (1 for your records, 1 for the Tribunal's records, and 1 to serve on the other land owner). You will need an additional copy of each additional party you nominate in the application (for example, a Local Council or an additional land holder if the plant covers two titles).

18.2.3 What are the fees?

There is a filing fee that must be paid at the time of lodging the application, in order for the application to be valid. Please refer to the Tribunal's website to determine the appropriate filing fee.

18.2.4 Application To Reduce Or Waive A Fee:

You can make an application to reduce or waive that fee if the Tribunal is satisfied that paying all or part of the fee may cause financial hardship. You will need to provide information in support of that application (See PD 2.3)

18.2.5 Review of Application:

Once you have filed your application it is reviewed by the Tribunal. The Tribunal will determine if additional information is required, and if so we will write to you seeking that information.

18.2.6 Notification of the application:

After the Tribunal has reviewed your application, the Tribunal will register the application and allocate a preliminary conference date and then return the applications to you for you to service on the parties stated.

After you lodge this application with the Tribunal, you are required to give a copy of this form and all supporting documents to:

- The owner of the property (respondent)
- Any government body you have nominated in your application
- Any person you have identified whose interests are affected by the application

The requirements of serving a document will be explained in a letter from the Tribunal which will be sent to you with the documents for service. You will be required to complete a Notice of Service to confirm you have served the documents.

PD 18.3 Tribunal Processes

18.3.1 Notification and Advertising:

If the Tribunal is satisfied the application has met all the necessary requirements to start, it will set a Preliminary Conference date approximately 14 - 21 days from the date of lodging the application.

The Tribunal will also advertise the existence of the application in the Public Notices section of the regional newspaper circulating in the area in question at least 5 - 7 days before the Preliminary Conference. It will invite persons who believe their interests may be affected by an order related to the plant, to make an application to join and attend the Preliminary Conference.

18.3.2 Preliminary Conference:

The Preliminary Conference will be conducted following the same process as for a Preliminary Conference for planning applications or appeals (See PD 4)

18.3.3 Alternative Dispute Resolution (ADR) and Mediation:

At the Preliminary Conference the Tribunal will assess whether Alternate Dispute Resolution (ADR) or Mediation may be appropriate to assist the parties in resolving the dispute. If it is appropriate, a date for ADR will be listed. Mediation and ADR will be conducted in the same way as for Planning disputes (See PD 5)

18.3.4 Consent Agreements:

If the parties can resolve their dispute by ADR or Mediation, an agreement will be prepared with the Orders that have been agreed to and submitted to the Chairperson for consideration. If the Chairperson is satisfied the orders are appropriate and within the Tribunal's power, the Orders will be issued.

18.3.5 Preparation for a Full Hearing:

If the parties do not resolve the application by a consent agreement, the dispute will need to proceed to a hearing. The parties will have received directions at the Preliminary Conference about the preparation of evidence and material. They will need to make sure they comply with those directions. The directions will be very similar to those issued for planning appeals (see Practice Directions 8, 8A, 8B, 9 & 11).

The parties will be notified of the panel of members who will hear the application before the hearing.

18.3.6 Hearing of the Application:

The hearing of the application will follow the same process as hearing for planning applications or appeals (See Practice Direction 7). Please note PD7.4 is slightly different in that the person who filed the application will present their case first.

18.3.7 Decision and Orders:

The Tribunal will issue a decision in writing to the parties and any government bodies that need to be notified, which sets out the reasons for the determination and any orders made. The order or orders will be included in the material.

Orders may last for up to 10 years depending on the decision of the Tribunal. They will set out the terms of the order; when the order takes effect; when any action required by the order is to be carried out; and who is required to carry out action under the order.

Consistent with other jurisdictions around Australia, where the Tribunal orders works to be carried out, those orders will require that a fully

qualified arborist undertake the works and that the arborist possess public indemnity insurance of no less than \$10,000,000.00.

Orders will be placed on the Tribunal's database within 14 days of being made.

The Tribunal's Database of Orders is for future searches which are permitted under Section 37 of the Act. To apply for a search of the Database, see PD 18.5.

18.3.8 Costs:

The costs of an application will be subject to the same Section that applies to planning appeals under Section 28 of the *Resource Management and Planning Appeal Tribunal Act 1993*. All parties will be given an opportunity to make an application for costs at the end of the proceedings and those applications will be dealt in the same way as other costs applications before the Tribunal. (See Practice Direction 15)

18.3.9 Appeal Rights:

As with any decision of the Tribunal, there is a right of appeal to the Supreme Court under Section 25 of the *Resource Management and Planning Appeal Tribunal Act 1993*. The appeal must be with respect to a question of law and must be commenced within 28 days of the Tribunal's decision.

PD 18.4 Application to Vary or Revoke an Order:

18.4.1 Who can make an Application to Vary or Revoke?

Only a landholder of affected land or an owner of land on which a plant is situated, to which an order of the Tribunal relates, can make these applications.

18.4.2 Complete The Form:

The Tribunal has provided a form that you will need to complete for making an application to vary or revoke an order.

18.4.3 What is the Fee?

There is a filing fee that must be paid at the time of lodging the application to Vary or Revoke, in order for the application to be valid. Please refer to the Tribunal's website to determine the appropriate filing fee.

18.4.4 Application to Reduce or Waive a Fee:

You can make an application to reduce or waive that fee if the Tribunal is satisfied that paying all or part of the fee may cause financial hardship. You will need to provide information in support of that application (See Practice Direction 2.3)

18.4.5 Notification:

The Tribunal will notify persons or government bodies of the application (in accordance with Section 36(4)). Those persons will be invited to advise the Tribunal if they wish to be heard in relation to the application.

18.4.6 Process if a Party wishes to be heard:

If another party wishes to be heard, the process set out above under PD 18.3 will be adopted to resolve the dispute.

18.4.7 If Variation or Revocation granted:

The Tribunal must update the Database of Orders within 14 days if a variation or revocation is granted.

PD 18.5 Applications to Search the Database of Orders:

18.5.1 Complete the Form:

The Tribunal has developed an online application form for making an application to search the Database of Orders. **The online application is the Tribunal's preferred method of lodgement.** The link for the search can be found under the Neighbourhood Disputes About Plants Act section on our website.

All details need to be provided on that form and searches will only be made by reference to a Certificate of Title Reference Number (or reference number for a parcel of land still registered under General Law). You must have that Certificate of Title Reference Number if you wish to search the Tribunal database.

If you wish to pay by means other than a credit card, a manual form is available in our Forms section for you to download and lodge at any Service Tasmania shop.

18.5.2 Search Fee

Please check the Tribunal's website for details of the current fee applicable for this service.

18.5.3 Application to reduce or waive a fee:

You can make an application to reduce or waive that fee if the Tribunal is satisfied that paying all or part of the fee may cause financial hardship. You will need to provide information in support of that application (See PD 2.3)

18.5.4 Filing the Search Application:

The Tribunal would prefer that Application to Search the Database be lodged via the Online Search function.

Alternatively a manually completed form together with your cheque can be lodged at any Service Tasmania shop.

Please do not email your search request and then send a hard copy. One or the other will suffice and reduce possible duplication or confusion.

18.5.5 Search Results:

The Tribunal will complete any searches within 14 days of their lodgement. If it is anticipated that the search will take longer than 14 days to complete, you will be notified in writing with an estimate of any additional time required.

Once the search is completed the Tribunal will forward to you a certified copy of the search result in accordance with Section 37(2) of the Act.