

The Role of Commissioners in the NSW Land and Environment Court

By Ashley Stafford

Introduction

In the New South Wales Land and Environment Court approximately 73% of proceedings filed each year are in two of the merits decision-making jurisdictions of the Court: Class 1 (environmental planning and protection appeals) and Class 2 (local government and miscellaneous appeals and applications).¹ The work at first instance in these classes of the Court's jurisdiction is often undertaken by Commissioners. Commissioners also undertake work in some other classes.

Accordingly, it is not unusual for Counsel briefed to appear in that Court, whether at the conciliation or hearing of a merits appeal or at mediation, to come before a Commissioner.

Commissioners are appointed based on their knowledge or qualifications, and experience, across a number of prescribed fields of expertise.² These fields include law, town planning, local government administration, environmental science, natural resource management, land valuation, architecture, engineering, Indigenous land rights or heritage. Commissioners are intended to be appointed across the range of expertise required by the *Land and Environment Court Act 1979 (Court Act)*.³

Commissioners, who were called 'Assessors' or 'conciliation and technical assessors' until the nomenclature in the Court Act was changed in 1998,⁴ can be appointed full-time or part-time, and there are a number of acting Commissioners. A Senior Commissioner is appointed, usually coming from a legal background.

While strictly speaking 'the Court' is composed of the Chief Judge and other judges of the Court,⁵ in proceedings that Commissioners are authorised to hear, they exercise the jurisdiction of the Court,⁶ the decisions of Commissioners are deemed to be the decisions of the Court⁷ and Commissioners' hearing and disposing of proceedings can exercise the functions of the Court subject to the Court Act and the rules of the Court.⁸

In this sense, Commissioners are different from extra-curial tribunal members exercising administrative functions because Commissioners must operate within the Court, but their role nonetheless requires them to apply



their expertise in a way which is analogous to the role of members of specialist tribunals in that they are expected to have qualifications and experience that enables them to determine merits proceedings.⁹ As for specialist tribunal members, Commissioners are able to bring their own knowledge and experience to bear on their decision-making,¹⁰ provided that in doing so they afford procedural fairness.¹¹

Also similar to the procedure of many tribunals is the fact that advocates remain seated in proceedings before a Commissioner.

Proceedings heard by Commissioners

There are a number of functions of the Court that Commissioners exercise.

The Chief Judge of the Land and Environment Court has discretion to direct that merits appeals or applications, in classes 1 and 2 of the Court's jurisdiction and Class 3 proceedings (land tenure, valuation, rating and compensation matters), be heard by one or more Commissioners.¹² A similar discretion applies for proceedings arising under the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991* (Class 8 proceedings),¹³ except that any Commissioners who hear those proceedings must be Australian lawyers.¹⁴

While judges may also hear such matters, Commissioners and not judges are required to preside over certain planning appeals or tree-related applications that the registrar

requires to be heard on the site the subject of the appeal or application.¹⁵

Even where proceedings are to be heard by a judge, Commissioners may sit with the judge to give assistance and advice to the Court, but not to adjudicate, in classes 1, 2, 3 or 8 of the Court's jurisdiction or Class 4 proceedings (civil enforcement and judicial review).¹⁶ In such cases, the Commissioner is prohibited from participating in the adjudication process, beyond giving assistance and advice.¹⁷

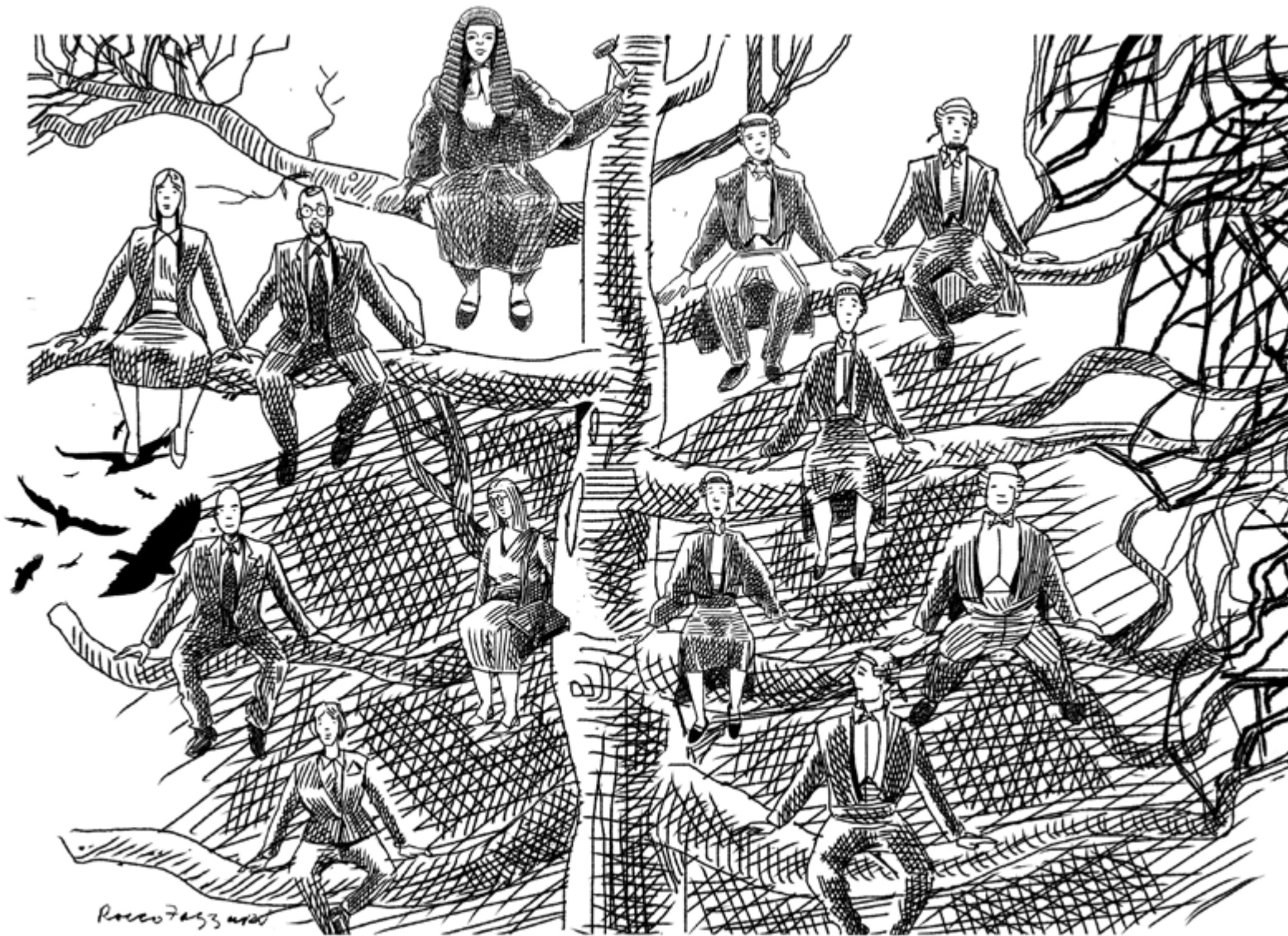
In allocating a specific Commissioner to a matter, the Chief Judge is required to have regard to the knowledge, experience and qualifications of the Commissioners and to the nature of the matters involved in the proceedings.¹⁸ However, other factors such as the availability of particular Commissioners affect the arrangements made by the Court and it is possible for a Commissioner to be allocated to a matter without prior experience in the subject area. As the allocation of the decision maker is usually only made known to parties on the business day before the hearing, legal representatives must therefore prepare for hearing on the assumption that the decision-maker might not be familiar with the areas of expertise at issue in the dispute.

Merits appeals or applications in the Court of the types which Commissioners are able to determine usually commence with a site inspection (unless the same Commissioner has already viewed the site during a conciliation) and usually return to Court for any hearing. Expert witnesses are usually expected to attend site inspections. In appeals where members of the public are entitled to make submissions, their verbal evidence is usually given at the site inspection.

Alternative dispute resolution

In the Land and Environment Court, alternative dispute resolution is often expected, particularly in merits appeals or applications.¹⁹

A Commissioner presides over Court-directed conciliation conferences in Class 1, 2 or 3 proceedings.²⁰ Conciliations in classes 1 or 2 usually commence with a site inspection, after which the conciliation conference can be hosted on-site (if facilities are avail-



able) or more often move to a local venue such as a council chambers or to a nearby Courthouse. If the conciliation is held in a Courtroom, the Commissioner usually sits on the other side of the bar table from the parties, rather than on the bench. As for Court hearings, where residents are entitled to make submissions, their verbal evidence is usually taken on-site before the conciliation conference commences.

If the conciliation does not resolve the dispute, the Commissioner can proceed to hear the matter if the parties agree²¹ and, in practice, if that Commissioner is allocated to hear the matter by the Chief Judge. Commissioners can also be required to proceed to hear a matter following a failed conciliation in the case of certain appeals involving smaller-scale residential development.²² In either of these cases where the same Commissioner ultimately hears the matter, the parties often consent to resident evidence and the Commissioner's observations during the site inspection being taken as evidence at the hearing, avoiding the need to repeat the process.²³

Where parties to a conciliation success-

fully reach agreement on the terms of a decision in the proceedings that '*the Court could have made in the proper exercise of its functions*', the Commissioner must dispose of the proceedings in accordance with the terms so agreed.²⁴ In doing so, the Commissioner is not required to consider the merits of the decision²⁵ but is required to be satisfied (which might include making findings of fact and/or law) that there is jurisdiction to make the decision in the terms sought.²⁶ The Commissioner is not required to look behind the purported authority of the parties to reach the agreement.²⁷

While a Commissioner can adjourn the conciliation if satisfied that there is good reason to do so,²⁸ in practice this power is used sparingly. The Court's *Conciliation Conference Policy* indicates that adjournments will usually only be granted in circumstances where the parties have reached an agreement in principle and where a short adjournment is required for documents to be prepared to finalise the agreement.

In civil proceedings (classes 1, 2, 3, 4 and 8), Commissioners with appropriate qualifications are also sometimes

appointed by the Court as mediators in Court-directed mediations under s 26 of the *Civil Procedure Act 2005*.

The Court can also refer these types of proceedings to Commissioners for neutral evaluation under rule 6.2(2) of the *Land and Environment Court Rules 2007*. However, neutral evaluation has fallen out of vogue, given that conciliation is routine in merits appeal matters and it is not unusual for mediation to be contemplated where suitable in enforcement proceedings.

A Commissioner can undertake an inquiry into any issue raised in, or other matter connected with, Class 3 proceedings if directed to do so by the Court with the consent of the parties. This appears to be rarely utilised, possibly given that the consent of the parties is required to adopt any finding or observation in the resulting report of the Commissioner – an unlikely prospect on any issue already in dispute before the Court.

Limitations on Commissioners exercising Court functions

The functions of the Court that Commissioners can exercise are limited in several ways. First, they can only exercise the Court's jurisdiction in the circumstances in which it is conferred on them by the Court Act and the rules of the Court, as outlined above.

Secondly, Commissioners are prevented from exercising a number of the Court's functions by rule 3.10 of the *Land and Environment Court Rules 2007*, including the power to make discretionary costs orders, the power to determine any question arising under the *Uniform Civil Procedure Rules 2005* and the Court's enforcement powers.

A notable exception to the prohibition on Commissioners making costs orders is that Commissioners are able to make orders under s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, for costs thrown away as a result of an amendment of an application for development consent other than minor amendments in certain appeals. Those costs orders are not discretionary and do not rely on the costs powers identified in rule 3.10. The mandatory nature of these orders means that parties are left to argue whether such amendments are minor²⁹ and whether amendments are in fact being made to the application for development consent.

Thirdly, there are other statutory or general law constraints on the powers of Commissioners that may be relevant in particular cases. The Court of Appeal has considered, in respect of the Land and Environment Court, that a 'Court exercising limited jurisdiction will be subject to constraints which may derive from differing sources', which sources in that case included the legislation that governed the subject matter of the appeal (which might also raise mandatory or prohibited considerations), the Court Act and the general law (including the requirement to afford procedural fairness, to act rationally and reasonably).³⁰

Appeals

Appeals from orders or decisions of a Commissioner are made to a judge of the Court and may only be made on questions of law.³¹ Any further appeal is made to the Court of Appeal³² but only by leave of that Court.³³

Nature of Commissioner decisions

Although decisions of Commissioners do not constitute precedent, Commissioners (and even judges) may have regard to the decisions of Commissioners when deciding proceedings, given the desirability of consistency of decision-making.³⁴

Since 2003 Commissioners (often the Senior Commissioner) have sometimes included 'planning principles' in their decisions on matters of general application. Those principles are also not binding, but the Court of Appeal has considered that

consistency in the application of planning principles is desirable.³⁵

Principles are emerging to the effect that the Court Act does not establish a hierarchy binding Commissioners to follow the determination of a single judge sitting in the same class of proceedings, unless on a preliminary question in the same matter. However, the circumstances in which the Commissioner might depart from single judge decisions, having regard to principles of comity, is yet to be fully settled,³⁷ given that the Court of Appeal has drawn a distinction between principles associated with the desirability of consistency of decision-making in Class 1 appeals and those concerning comity.³⁸

Just because Commissioners hear merits appeals or applications does not mean that Commissioners do not, or cannot, decide questions of the law in the course of those proceedings. To the contrary, the Court frequently entertains legal questions in merits appeals.³⁹

As a consequence, Commissioner decisions are an important resource for barristers briefed to appear in merits appeals or applications in the Land and Environment Court.

ENDNOTES

- 1 Average of annual percentage of registrations (filings) from 2013 to 2017 in classes 1 and 2 excluding restored proceedings, using raw statistics from Department of Justice, *The Land and Environment Court of NSW: Annual Review 2017*, State of NSW, 2018 pp 31-32.
- 2 That a candidate has the required qualifications is a matter for the satisfaction of the Attorney General: *Land and Environment Court Act 1979* (Court Act) s 12(2).
- 3 Court Act s 12(2AB).
- 4 Courts *Legislation Further Amendment Act 1998* s 3 and Schedule 6.
- 5 Court Act s 7.
- 6 Court Act s 33(1) and (2A).
- 7 Court Act s 36(3).
- 8 Court Act s 36(4).
- 9 *Murlan Consulting Pty Ltd v Ku-Ring-Gai Municipal Council* [2008] NSWLEC 318 at [51] per Pain J, which statement of principle was accepted in *Murlan Consulting Pty Ltd v Ku-Ring-Gai Municipal Council and Another* [2009] NSWCA 300; (2009) 170 LGERA 162 at [45], [49] and [51] per Basten JA (Macfarlan JA agreeing at [85]) albeit that the appeal was allowed.
- 10 *Crown Atlantis Joint Venture v Ryde City Council* [2005] NSWLEC 303 at [43] per Lloyd J.
- 11 For example, *Castle Constructions Pty Ltd v North Sydney Council* [2008] NSWLEC 239 at [20] and [28] per Biscoe J.
- 12 Court Act s 36(1), noting that there is a specific provision in s 34C for proceedings to which s 34A(4) applies.
- 13 Court Act s 42.
- 14 Court Act ss 30(2C) and 33(2A).
- 15 Court Act ss 34A and 34B.
- 16 Court Act s 37 and 43.
- 17 *Carlewie Pty Ltd v Roads and Maritime Services (NSW)* [2018] NSWCA 181; (2018) 98 NSWLR 233 at [38] per Basten JA (Payne JA agreeing at [56] and White JA agreeing at [57]).
- 18 Court Act s 30(2).
- 19 For example, *Practice Note – Class 1 Development Appeals* at [32]-[33], *Practice Note – Miscellaneous Appeals* at [30]-[31], *Practice Note – Class 3 Compensation Claims* at [33] and [37], *Practice Note – Class 3 Valuation Objections* at [12], [16]-[17].
- 20 Court Act s 34(2).

- 21 Court Act s 34(4)(b).
- 22 Court Act s 34AA(2).
- 23 Court Act s 34(4)(b)(ii) and 34AA(2)(b)(ii).
- 24 Court Act s 34(3).
- 25 *Al Maha Pty Ltd v Huajun Investments Pty Ltd and Others* [2018] NSWCA 245; (2018) 233 LGERA 170 at [33] per Basten JA (Leeming JA agreeing at [41]).
- 26 [2018] NSWCA 245; (2018) 233 LGERA 170 at [16] and [29] per Basten JA (Leeming JA agreeing at [41]) and at [76] and [79] per Preston CJ of LEC (Leeming JA agreeing at [41]).
- 27 *Presrod Pty Ltd v Wollongong City Council* [2010] NSWLEC 192 at [61]-[63] per Craig J.
- 28 Court Act s 34(6).
- 29 For example, *Futurespace Pty Ltd v Ku-ring-gai Council* [2009] NSWLEC 153 at [42] per Pepper J.
- 30 [2018] NSWCA 245; (2018) 233 LGERA 170 at [14] per Basten JA (Leeming JA agreeing at [41]).
- 31 Court Act s 56A(1).
- 32 Noting s 48 of the *Supreme Court Act 1970*.
- 33 Court Act s 57(4)(c).
- 34 *Segal v Waverley Council* [2005] NSWCA 310; 64 NSWLR 177 at [56] per Tobias JA (Beazley JA agreeing at [1] and Basten JA agreeing at [102]).
- 35 [2005] NSWCA 310; 64 NSWLR 177 at [15]-[16] and [96] per Tobias JA (Beazley JA agreeing at [1] and Basten JA agreeing at [102]).
- 36 *Mac Services Group v Mid-Western Regional Council* [2014] NSWLEC 1072 at [54] per Csr Dixon (as she was); *Challenger Listed Investments Limited v Valuer General (No 2)* [2015] NSWLEC 60 at [30] per Pepper J.
- 37 See [2014] NSWLEC 1072 at [67] and [2015] NSWLEC 60 at [31] per Pepper J.
- 38 [2005] NSWCA 310; (2005) 64 NSWLR 177 at [48] per Tobias JA (Beazley JA agreeing at [1] and Basten JA agreeing at [102]).
- 39 See e.g., *Helman v Byron Shire Council* (1995) 87 LGERA 349 at [360] per Handley JA at [360] (Kirby AC) and Priestley JA agreeing) and *Australian International Academy of Education Inc v Hills Shire Council* [2013] NSWLEC 1; (2013) 196 LGERA 1 at [98]-[110] per Craig J.