

Tom Clarke



Tom Clarke practises in commercial, regulatory and public law, particularly in energy, commercial arbitration, financial services and private international law.

QUALIFICATIONS

Bachelor of Laws (Hons)
Bachelor of Arts (Hons)

CORRESPONDENCE

P 03 9225 8558
E tom.clarke@vicbar.com.au

CHAMBERS

Ninian Stephen Chambers
Level 38 Room 20
140 William Street
Melbourne VIC 3000

COMMERCIAL LAW

Appellate | Banking & Finance | Commercial Arbitration | Competition | Consumer Credit | Consumer Law | Contractual Disputes | Corporations & Securities | Energy & Resources | Equity & Trusts | Insurance | Private International Law | Real Property | Superannuation | Regulatory Investigations

TORT LAW

Commissions & Inquiries | Major Torts | Professional Negligence

PUBLIC LAW

Administrative Law | Aged Care | Appellate | Commissions & Inquiries | Customs Law | Extradition Law | Judicial Review

Tom is recognised as a market leader in the energy sector. He has deep knowledge of the national electricity and gas markets, having acted in numerous disputes across the generation, network and retail sectors, including civil penalty enforcement matters and access disputes in both gas and electricity networks. Tom is a member of the pool of experts for the Wholesale Energy Market Dispute Resolution Panel. He also provides specialist advice to a wide range of market participants, energy regulators, market bodies and governments about regulatory matters and proposed rule changes.

Tom is a Fellow of the Australian Centre for Commercial Arbitration (ACICA) and the Chartered Institute of Arbitrators (CIArb) and a member of the Hong Kong International Arbitration Centre (HKIAC) list of arbitrators. He acts as both counsel and arbitrator in energy arbitrations. He has also acted in a number of applications to enforce international arbitration awards, including against the Sauber Formula 1 team (on an urgent basis, before the 2015 Australian Grand Prix) and against Joseph Gutnick.

Tom also acts regularly in Hong Kong and China-related disputes, both in court and in arbitration, and has acted as an expert witness on questions of Hong Kong law. Tom has also acted for ASIC in financial services enforcement matters, including in superannuation and matters with China and SE Asia emerging market aspects.

Beyond energy and financial services, Tom also has extensive regulatory experience extending to the telecommunications, health, aged care, pharmacy and industry R&D sectors.

Before coming to the Bar, Tom practised as a commercial litigator for eight years, including six years in Hong Kong with Freshfields Bruckhaus Deringer. He appeared as a solicitor advocate in the Hong Kong High Court and Court of Final Appeal, and in arbitrations in Hong Kong, China, Singapore, London and Stockholm. Tom was lead associate in the team acting for the Brunei Investment Authority in its proceeding against HRH Prince Jefri Bolkiah to enforce an earlier settlement of its US\$15 billion claim.

Liability limited by a scheme approved under the Professional Standards Legislation

Recent Cases

INTERNATIONAL COMMERCIAL ARBITRATION

Beijing Jishi Venture Capital Fund v Liu [2021] FCA 477 – Appeared for a respondent who successfully resisted enforcement of an A\$30 million CIETAC award on the ground that she was not given proper notice of the arbitration (unled).

Blanalko v Lysaght Building Solutions (2017) 52 VR 198 – Successfully opposed an application to set the award aside, and stayed an application to relitigate the claim in the Supreme Court of Victoria (unled).

Gutnick v Indian Farmers Fertiliser Cooperative (2016) 49 VR 732 (VSCA) – Appeared for the Indian and UAE award creditors, successfully resisting Joseph Gutnick's appeal against a decision allowing enforcement of a Singapore arbitral award. (led by Neil Young KC and Chris Horan KC).

Giedo van der Garde v Sauber Motorsport (2015) 317 ALR 792 (VSC); (2015) 317 ALR 786 (VSCA) – Appeared for a Formula 1 driver against the Sauber team, in the driver's urgent application to enforce a Swiss arbitral award in Victoria, prior to the 2015 Australian Grand Prix. The application succeeded at first instance and on appeal, with the application, appeal and subsequent contempt of court proceedings heard and resolved within less than a week (unled at first instance; led by Jim Peters KC on appeal).

HKIAAC emergency arbitration (2015) – Appeared in an emergency arbitration proceeding in Hong Kong. The hearing was conducted in English, Mandarin and Cantonese and on Chinese-language documentary evidence. The emergency award was made within 2 weeks of the commencement of the arbitration (unled).

COMMERCIAL ARBITRATION - ENERGY

Solar farm PPA dispute (2023) – Appeared for an intermediary off-taker in an arbitration relating to power purchase agreements from multiple solar farms (leading Laila Hamzi).

Electricity transmission connection dispute (2022) – Appeared for a network service provider in an expedited arbitration regarding connection of a major industrial load (leading Elizabeth Bateman).

Bass Strait petroleum royalty arbitration (2021) – Appeared for participants in a Bass Strait production licence in an arbitration concerning the interpretation and valuation of an over-riding royalty (led by Neil Young KC).

Tasmanian Gas Pipeline arbitration (2018) – Appeared for the pipeline operator in the first non-scheme pipeline access arbitration under Part 23 of the National Gas Rules (led by Neil Young KC).

Basslink v Hydro-Electric Corporation [2013] VSC 746 – Appeared for Basslink in a series of arbitrations before the Hon Murray Gleeson AC KC relating to the operation of the Basslink interconnector, and in successful court application for interim relief (led by Alan Archibald KC, Jim Delany KC).

ENERGY REGULATION

Australian Energy Regulator v Pelican Point Power [2023] FCA 1110 and [2024] FCA 277 – Appeared for the AER, which obtained findings of contravention against the operator of a gas-fired generating unit, for failure to notify AEMO of its potentially available capacity on the date of a load shedding event in South Australia in February 2017. This was the AER's first successful contested civil penalty case, both as to liability and penalty (led by Andrew McClelland KC at liability trial; leading Matthew Peckham at penalty trial).

AER v AGL Loy Yang Marketing [2023] FCA 1299 – Appeared for the AER, which obtained civil penalties against AGL for the failure of its Loy Yang A and Bayswater power stations to provide frequency control ancillary services (led by James Arnott SC).

AER v AGL HP 1 [2022] FCA 737

AER v HWF1 [2021] FCA 732

AER v Pacific Hydro Clements Gap [2021] FCA 733

AER v Snowtown Wind Farm Stage 2 [2020] FCA 1845

Appeared for the AER, which obtained civil penalties and other compliance relief against wind farm operators in connection with the South Australian blackout of September 2016 for failure to notify AEMO of protection settings on their wind turbines (led by Ruth Higgins SC).

SA street lighting access dispute (2019) – Appeared for the South Australian government and municipal councils in a successful challenge to tariffs charged by SA Power Networks for public lighting services. This was the first

network access arbitration heard and determined by the AER (led by Sam Horgan KC).

Now acting in a related contract proceeding brought by a former consultant to the State and councils (leading Robert Williams): *Trans Tasman Energy Group Pty Ltd v South Australia* (2022) 141 SASR 420.

Origin Energy Electricity v AEMO [2016] Wholesale Energy Dispute Resolution Panel - Tom appeared for a coalition of South Australian wind farm operators, in a multi-party dispute over AEMO's settlement of FCAS costs during planned outages of the Heywood interconnector (unled).

AER v Australian Competition Tribunal (2017) 255 FCR 274

Re Public Interest Advocacy Centre, Ausgrid, Endeavour Energy and Essential Energy [2016] ACompT 1, 2 & 3
Appeared for PIAC in the first limited merits review applications commenced by a consumer group against the AER's network revenue determination (led by Sam Horgan KC).

Tom also advises the Australian Energy Markets Commission, the Victorian Department of Energy and the Energy Corporation of NSW regarding potential rule changes to the *National Electricity Rules*, the *National Gas Rules* and the *National Energy Retail Rules*, and the Essential Services Commission of Victoria regarding regulatory amendments under the *Electricity Industry Act* and *Gas Industry Act*.

PRIVATE INTERNATIONAL LAW

Brighton Automotive Holdings v Honda Australia (2021) 65 VR 146 - Appeared for Honda Motor Co, in an application to stay an application for preliminary discovery against a foreign parent company on jurisdictional and comity grounds (leading Huw Watkins).

China Insurance Group Finance v Kingston (No 2) (2022, VSC, unrep) – Appeared in response to an application for the issue of a letter of request for witness evidence to be given by video-link from Hong Kong before trial, under the Hague Evidence Convention (led by Carl Moller).

BANKING AND FINANCIAL SERVICES

China Insurance Group Finance v Kingston (No 3) [2023] VSC 6

Appeared in HK\$650 million loan recovery proceeding, involving defences under Hong Kong financial services laws and the ASIC Act (led by Carl Moller)

Hu v Cheung [2022] VCC 1565 – Obtained judgment for contribution against a co-guarantor and resisted the co-guarantor's claim for indemnity against the corporate borrower (unled).

Financial Services Royal Commission (2018) – Appeared for ANZ in the CEO round of royal commission hearings (led by Matt Collins KC, Kate Williams SC and Michael Rush KC).

ASIC v Avestra Asset Management (2017) 120 ACSR 247

Appeared for ASIC in an application for financial services injunctions and disqualification against directors of a funds management company, for numerous contraventions by Avestra as responsible entity and trustee of registered and wholesale managed investment schemes (led by Jonathon Moore KC).

MacarthurCook Real Estate Funds v APN Funds Management [2013] VSCA 239 & 24 – Tom acted for companies in the MacarthurCook group in appeals relating to the allocation of, and a put option over, units in a property

investment unit trust (led by Phil Solomon KC).

SUPERANNUATION, EQUITY AND TRUSTS

Currently acting for ASIC in its first SIS Act civil penalty case, against a large not-for-profit super fund (leading Simone Kipen).

ExxonMobil Superannuation Plan v Esso Australia (2010) 29 VR 356 – Appeared for Esso Australia in a claim for rectification of a superannuation trust deed, and in professional negligence proceedings against the plan's former actuaries. The claim arose from drafting errors first made in 1990, which created an unintended liability of over \$500 million (led by Neil Young KC, Melanie Sloss SC, Mark Moshinsky KC).

INSURANCE

Aftermarket Network Australia v Certain underwriters at Lloyd's [2016] FCA 1402 (unled)

Ancor Flexibles Group v AIG Australia [2016] FCA 1428 (led by Jim Delany KC)

Appeared for insureds under M&A warranty and indemnity policies, in the Federal Court's expedited insurance matters list. *Aftermarket Network Australia* addressed important issues as to the interaction between exclusions in the share sale agreement and the W&I policy.

COMPETITION

Re Flexigroup [2020] ACompT 2 – Appeared for the Consumer Action Law Centre, intervening in a review of ACCC authorisation of the New Energy Tech Consumer Code, about whether signatories to the Code should be permitted to offer “buy now, pay later” finance with the sale of solar and new energy tech products (leading Matthew Peckham).

TELECOMMUNICATIONS

OPENetworks v MyPort [2019] FCA 486 & 1659 – Appeared for a broadband network and service provider in disputes regarding the TIO's power to approve installations of telecommunications facilities in residential developments (leading Jordan Wright).

HEALTH AND AGED CARE REGULATION

Regis Aged Care v Secretary, Department of Health (2018) 261 FCR 120 – Appeared for Regis in a proceeding seeking to confirm the validity of charges pronounced unlawful by the Department (led by Peter Hanks KC).

Secretary, Department of Health v DLW Health Services (2016) 246 FCR 456 – Appeared for the Commonwealth Department in an appeal overturning an AAT decision which had held the complex healthcare criteria under the aged care funding instrument to be invalid (led by Peter Hanks KC).

INDUSTRY AND R&D INCENTIVES

Automotive Components Limited v Secretary, Department of Industry and Science (2016) 237 FCR 468 –Appeared for the Department of Industry in the AAT and on appeal to the Full Federal Court, in a review upholding the Department’s decision on entitlements under the Automotive Transition Scheme (unled).

Memberships

Victorian Bar - Commercial Bar Association Energy Section

Member, Australian Institute of Energy

AMPLA (The Resources and Energy Law Association)

Australia-China Business Council

Member, Chartered Institute of Arbitrators