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978-1-107-03606-2 - Climate Change Litigation: Regulatory Pathways to Cleaner Energy

Jacqueline Peel and Hari M. Osofsky

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## CLIMATE CHANGE LITIGATION

This examination of the role of litigation in addressing the problem of climate change focuses not only on how the massive and growing number of lawsuits influences regulation directly but also on how the lawsuits shape corporate behavior and public opinion. It provides readers with an understanding of how these lawsuits have shaped approaches to mitigation and adaptation and have been used to try to force and to block regulation. There is a particular emphasis on lawsuits in the United States and Australia, the two jurisdictions that have had the most climate change litigation in the world, and the lessons supply broader insights into the role of courts in addressing climate change.

Both authors are internationally recognized experts on climate change law. JACQUELINE PEEL is a professor of law at the Melbourne Law School, Australia. Her teaching and research interests lie in the areas of environmental law (domestic and international), risk regulation and the role of science, and climate change law.

HARI M. OSOFSKY is a professor of law and the 2014–15 Julius E. Davis Chair in Law at the University of Minnesota, where she is also faculty director of the Energy Transition Lab and director of the Joint Degree Program in Law, Science, and Technology. Her research focuses on energy transition and climate change.

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To our children and the future generations that depend on  
our addressing climate change adequately

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## PREFACE AND ACKNOWLEDGMENTS

Courts have often been central battlegrounds in fights to address important social issues, from civil rights to the health effects of smoking. The latest such courtroom battlefield concerns efforts to deal with the problem of climate change. As we highlight in Chapter 1, lawsuits raising climate change issues have been brought across six continents and in eighteen different countries, as well as in international tribunals. In total, climate change cases worldwide now number close to seven hundred claims.

This book explores the consequences of that litigation explosion for regulatory action to deal with the climate change problem. In essence, *how* does litigation shape regulatory and behavioral responses to climate change, and, in the process, pathways toward a “cleaner energy” future – sustainable, low-carbon societies that will be resilient in the face of a changing climate?

The book examines this central question from a range of different perspectives: the roles of climate change litigation as a tool for (1) reducing greenhouse gas emissions and increasing adaptation to the effects of climate change, (2) changing social and business norms, and (3) providing a forum in which pro- and antiregulatory forces interact. It combines doctrinal analysis of the case law and associated regulatory development with unique insights about the significance of the litigation drawn from interviews with those actively involved in bringing, adjudicating, and responding to the lawsuits.

Two countries provide the main case studies for this examination: the United States and Australia. These are the nations in which the most climate change litigation has taken place. As major players in the global carbon economy, both countries also face significant challenges in transitioning away from reliance on fossil fuels like coal to foster a cleaner energy future.

We see this book as an important, novel contribution to the scholarship and practice of climate change litigation that has burgeoned in the

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past decade, including three major US Supreme Court decisions, *Massachusetts v. EPA* (2007), *American Electric Power v. Connecticut* (2011), and *Utility Air Regulatory Group v. EPA* (2014). The book moves beyond the first wave of scholarship analyzing individual cases and the second wave cataloging and classifying the types of climate change litigation. It tackles the regulatory significance of this case law and how it has, does, and is likely to influence the behaviors and choices that matter for climate change mitigation and adaptation. We hope that, by addressing these issues, the book will be a useful resource for both regulators and litigators in the field as well as for judges, activists, business organizations, academics, and students.

We have found our transnational collaboration to be a rich and rewarding experience. Each of us is an expert in climate change litigation and regulation in our home countries of Australia (Jacqueline Peel) and the United States (Hari Osofsky). As a result of writing the book, we both have a deeper appreciation for and understanding of climate change litigation–regulation dynamics in each other’s home jurisdiction, but also in our own. The comparative analysis in the book illuminated many similarities between the climate change litigation experiences of the United States and Australia but also some surprising and interesting differences that have implications for the future trajectory of the litigation in each country; it also potentially offers lessons for claimants in other countries about the regulatory pathways that litigation can generate. As one example, the United States and Australia confront similar challenges in responding to climate change on both the mitigation and adaptation fronts. However, case law targeting greenhouse gas emissions has achieved far more substantial regulatory success in the United States than in Australia, whereas Australia leads the United States in adaptation litigation. In discussing and seeking to explain the relative regulatory significance of climate change case law in each jurisdiction, the book therefore offers a window into the particular social, political, and legal features that shape litigation’s regulatory pathways.

Writing this book was our first substantial collaboration as coauthors. However, this work has drawn on and developed our previous publications, authored separately and together. We would particularly wish to acknowledge the prior work we have reproduced in edited form or on whose ideas we have built: William C. G. Burns and Hari M. Osofsky (eds.), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009); Hari M. Osofsky, “The Intersection of Scale, Science, and Law in *Massachusetts v. EPA*,”

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*Oregon Review of International Law* 9 (2007); Hari M. Osofsky, "Litigation's Role in the Path of U.S. Federal Climate Change Regulation: Implications of *AEP v. Connecticut*," 46 *Valparaiso University Law Review* (2012); Hari M. Osofsky and Jacqueline Peel, "Litigation's Regulatory Pathways and the Administrative State: Lessons from U.S. and Australian Climate Change Governance," 25 *Georgetown International Environmental Law Review* (2013); Hari M. Osofsky and Jacqueline Peel, "The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future," 30 *Environmental and Planning Law Journal* (2013); Jacqueline Peel, "Issues in Climate Change Litigation," 5 *Carbon and Climate Law Review* (2011); Jacqueline Peel, Lee Godden, and Rodney J. Keenan, "Climate Change Law in an Era of Multi-Level Governance," 1 *Transnational Environmental Law* (2012); Jacqueline Peel and Hari M. Osofsky, "Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia," 35 *Law and Policy* (2013); Alexander Zahar, Jacqueline Peel, and Lee Godden, *Australian Climate Law in Global Context* (Cambridge, 2013); Hari M. Osofsky, "*AEP v. Connecticut*'s Implications for the Future of Climate Change Litigation," 121 *Yale Law Journal Online* (2011–12); and Jacqueline Peel and Hari M. Osofsky, "Sue to Adapt?," *Minnesota Law Review* (forthcoming).

In undertaking the research for this project, including the interview component, we benefited greatly from funding provided under an Australian Research Council grant: Discovery Project 130100500, "Transition to a Clean Energy Future: The Role of Climate Change Litigation in Shaping Our Regulatory Path" (2013–15). This grant funding facilitated workshops and attendance at conferences in Australia, the United States, and elsewhere to present our interim findings and receive feedback on our work. We would particularly like to thank colleagues at Minnesota Law School and Melbourne Law School for feedback on early stages of the research and draft chapters of the book provided at workshops held in each location. We also benefited greatly from feedback at the 2012 British Academy Conference on Climate Change Litigation, Policy and Mobilization; the 2013 American Society of International Law Annual Meeting; the 2013 Australian National Environmental Law Association Conference; the 2013 International Law Weekend – Midwest at Washington University School of Law; and the 2014 Law and Society Annual Meeting. Other colleagues who provided helpful feedback whom we would particularly like to acknowledge include Helen Anderson, Bradley Karkkainen, Michael Gerrard, Lee Godden, Kristin Hickman, Alexandra Klass, Alice Kaswan, Mark Poirer, J.B. Ruhl, Gerry Simpson, Lisa Vanhala, and Rob

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Verchick. Australian Research Council funding also allowed us to employ research assistants – Lisa Caripis, Emma Cocks, and Nick Boyd-Caine at Melbourne University School of Law and Thomas Burman, Joseph Dammel, Drew McNeill, Justin Moor, and Sarah Schenck at the University of Minnesota Law School. We are indebted to these individuals for their research efforts and assistance with footnoting. Lisa and Nick, building on earlier efforts by Rachelle Downie, Mick Power, and Naomi Wynn, were also central to the establishment, updating, and maintenance of the web database of Australian climate change case law developed for the project. This database is housed with Melbourne Law School's Centre for Resources, Energy, and Environmental Law at [www.law.unimelb.edu.au/creel/research/climate-change](http://www.law.unimelb.edu.au/creel/research/climate-change).

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We would also like to extend a sincere thank-you to our interviewees in the United States and Australia who undertook interviews with us for the purposes of this project. In accordance with the ethics procedures of our home institutions of the University of Melbourne and University of Minnesota, interviewees are not named in the book to protect the confidentiality of their responses. However, we wish to acknowledge their generosity in giving of their time, experience, and expertise. We appreciate the many wonderful insights they offered into climate change litigation in the United States and Australia and the influence it has had and may have in the future. We have included quotations from our interviewees throughout the book. In addition, two quotations – one from a US interviewee and one from an Australian interviewee – appear at the beginning of each chapter. We hope our readers enjoy and benefit from these pithy, honest, and perceptive comments on the regulatory pathways of climate change litigation as much as we did.

Last, but not least, we would like to thank our respective families for their love, support, and patience during the writing of this book. Jacqueline extends particular thanks to husband Michael Findlay, daughter Aly, and son Will. Hari would like to thank husband Joshua Gitelson, son Oz, and daughter Scarlet. As mothers of young children, we feel a particular responsibility to ensure that we are a constructive part of efforts to

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address the problem of climate change. We hope that this book sheds light on the role of litigation in regulatory progress and contributes to broader understanding of the necessary elements of effective climate change governance. We dedicate this book to our children and the future generations that depend on our addressing climate change adequately.