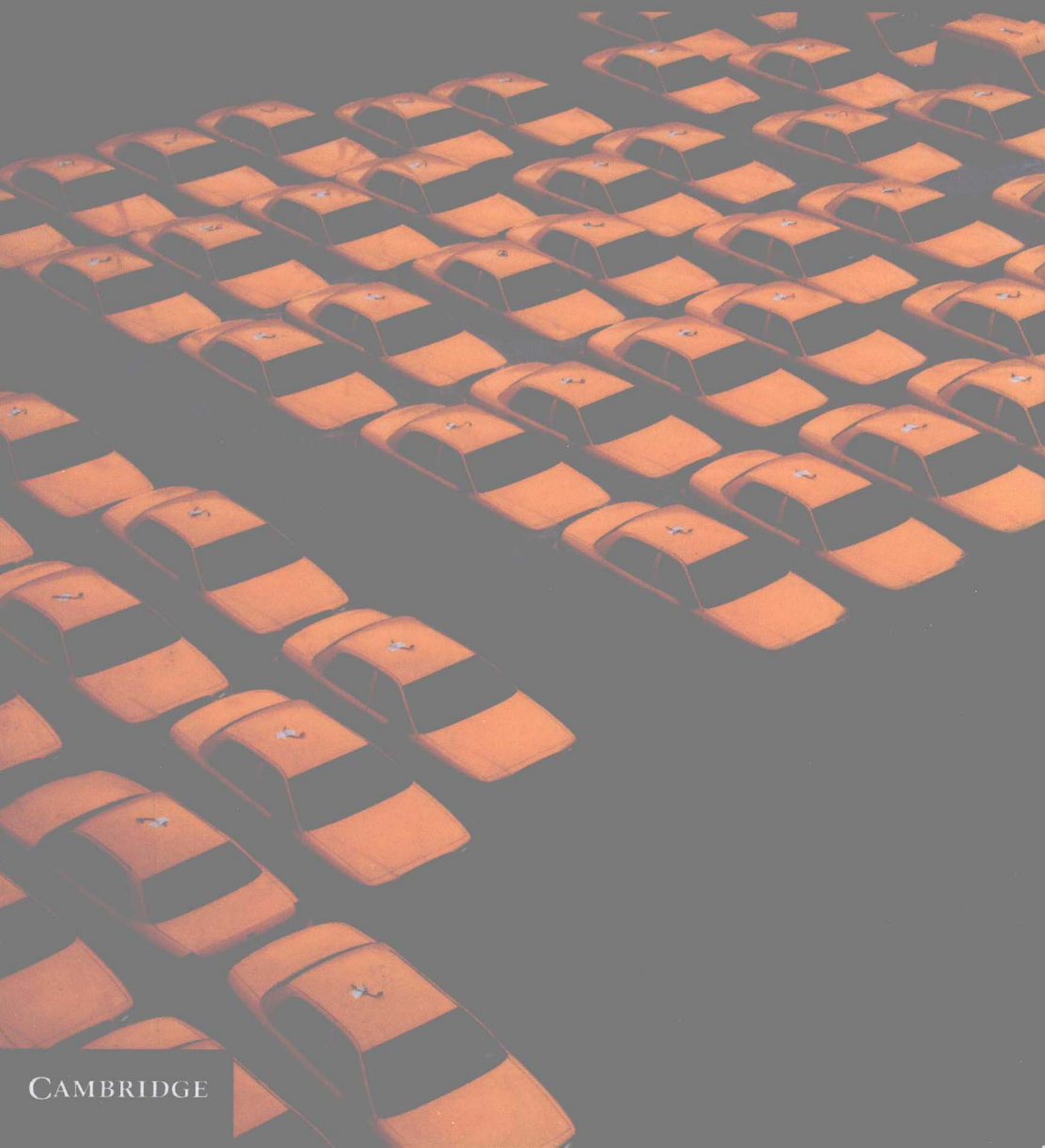


JACQUELINE PEEL AND HARI M. OSOFSKY

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Climate Change Litigation

Regulatory Pathways to Cleaner Energy

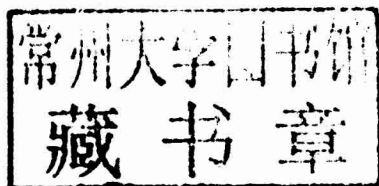


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CLIMATE CHANGE LITIGATION

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

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

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*,”

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

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.

From the outset of this project, the editorial team at Cambridge University Press has been extremely supportive. We appreciate their editorial work, support for the project, and flexibility as the project evolved. In particular, we would like to acknowledge the support of series editor Professor James Crawford, commissioning editors Finola O'Sullivan and Elizabeth Spicer (and before Elizabeth, Nienke van Schaverbeke), and the marketing and editing team led by Richard Woodham.

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

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.

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Why climate change litigation matters

Everything is litigated, everything will be litigated. And that's the starting point and the presumption. No matter how small the rule is or how big the rule is. It's going to be litigated. And it's going to be decided by the D.C. Circuit if it's a federal rule and if it's a state rule it's going to be decided somewhere else in some court. It's just the nature of America! I mean, I am gainfully employed, likely, because of the degree to which we rely upon law to guide regulatory development as opposed to other countries, which are policy-driven.

– US Interview Participant 5

I take a long-term view [of] climate litigation. I really think we are like lawyers in Alabama in 1950 fighting for black civil rights or . . . lawyers at the early stages of cigarette and asbestos litigation, trying to establish a causal link between cigarettes and lung cancer. And, you know, you get looked at like you've got two heads and you're green by the courts to start with and you get lots of bad decisions. But the issues are so enormous and the science is so strong; it's not like the problem is going away. So I take a long-term view to these cases that we will have many losses and it's about doing the right thing. Even if at the end of the day we don't change and our society just continues on this suicidal approach of burning fossil fuels, I think we have to do what we can now, with the tools we have, to try and protect the future.

– Australian Interview Participant 4

1.1 Introduction

Courtrooms have become a key battleground in the public debate over climate change around the world. Lawsuits over climate change have been brought in eighteen countries on six continents, as well as in international tribunals.¹ In the United States alone, which has more of these cases than

¹ For details, see Richard Lord, Silke Goldberg, Lavanya Rajamani, and Jutta Brunnée (eds.), *Climate Change Liability: Transnational Law and Practice* (2011, Cambridge University Press, Cambridge); Arnold and Porter LLP, "U.S. Climate Change Litigation Chart" and

any other country, more than five hundred cases under many different laws in state and federal courts have raised climate change mitigation and adaptation issues.² These lawsuits – brought by both those supporting climate change regulation and those fighting it – and the media attention surrounding them have shaped regulation in these countries directly through mandate and indirectly through influencing corporate behavior and social norms.

The most prominent example of climate change litigation is *Massachusetts v. EPA*, the first US Supreme Court decision on climate change, which provided the basis for federal regulation by the US Environmental Protection Agency (EPA) of motor vehicle and power plant greenhouse gas emissions.³ This decision may be “the most important environmental case of the century, if ever,” issued by the US Supreme Court.⁴ For those working in the field of climate and energy law – such as the regulators, lawyers, judges, energy company representatives, planners, insurance risk managers, and environmental campaigners whom we interviewed for this book – the case is “bedrock by now.”⁵ It established that the Clean Air Act provides the US government with the authority to regulate greenhouse gas pollution, the principal contributor to global climate change.⁶ No less momentous was the US Supreme Court’s endorsement of climate change as a serious public policy issue. A decision like that “causes everybody to perk up and take notice; so, at least in the deliberations and corporate boardrooms, they say we can’t completely dismiss this anymore.”⁷

Because *Massachusetts v. EPA* was such an important decision, though, it tends to overshadow the fact that hundreds of other US cases have had a variety of impacts on the country’s regulation of climate change. Moreover, litigation has also been an important influence on climate regulation in other major developed-country greenhouse gas emitters. Australia is one such nation; it has seen an enormous growth in climate

“Non-U.S. Climate Change Litigation Chart,” www.climatecasechart.com; and Climate Justice Programme, “Cases,” www.climatelaw.org/cases.

² A comprehensive database of climate change cases filed and decided in US courts, including links to judgments, is maintained by the Columbia Climate Change Law Center. See, further, Arnold and Porter LLP, “U.S. Climate Change Litigation Chart.” Climate change “mitigation” refers to efforts to reduce greenhouse gas emissions from human sources, whereas climate change “adaptation” focuses on managing the impacts of climate change on communities, infrastructure, and the environment.

³ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁴ In-person interview, US Participant 5 (Nov. 14, 2012). ⁵ Ibid.

⁶ The findings of the case and its subsequent impact on US climate regulation are described in depth in Chapter 3.

⁷ Telephone interview, US Participant 8 (Nov. 26, 2012).