

Trends in Climate Litigation: Public, Private and Global

Monday, 22 July 2019

Melbourne Law School, 185 Pelham St, Parkville, Level 1, Room 102

Biographies and abstracts

Introduction and Aims of the Workshop - *Jacqueline Peel, University of Melbourne*

Professor **Jacqueline Peel** is a leading, internationally-recognised expert in the field of environmental and climate change law. She is the author or co-author of several books and numerous articles on these topics including *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (with H. Osofsky, 2015, CUP). Professor Peel has been an active contributor to public policy formulation on climate change and environmental issues at the national and international level through her work on bodies such as the International Law Association's Committee on Legal Principles Relating to Climate Change, the International Bar Association's Working Group on a Model Statute for Climate Change Relief and the Australian Panel of Experts in Environmental Law. From 2019-2021, Professor Peel is a Lead Author in WGIII of the Inter-Governmental Panel on Climate Change for its 6th Assessment Report. In addition to these roles, Professor Peel has served on the Membership Committee of the American Society of International Law and as co-chair of its International Environmental Law interest group (2014-2017), and is currently a Council Member of the Australia New Zealand Society of International Law. She is a member of the Editorial Board for *Climate Law*, *Transnational Environmental Law*, the *Yearbook of International Disaster Law*, the *European Journal of Risk Regulation* and the *Environmental and Planning Law Journal*. Professor Peel's research has attracted competitive funding from various organisations, including the Australian Research Council (ARC), VCCCAR and the United States Studies Centre. Together with Dean Osofsky, Professor Peel provides evaluation and research consultancy services to the UK-based Children's Investment Fund Foundation for their grants on strategic climate change litigation.

Climate Litigation: Trends and Drivers

- Global trends in climate change litigation – *Hari Osofsky, Penn State Law School and School of International Affairs*

Hari M. Osofsky is Dean of Penn State Law and the Penn State School of International Affairs and Distinguished Professor of Law, Professor of International Affairs, and Professor of Geography. As dean, she is deeply committed to collaboratively building legal and international affairs education for a changing society, and is leading initiatives in mentoring, technology, and interdisciplinary and international partnerships. The American Bar Association's Legal Technology Resource Center recognized her for this leadership as one of the 2019 Women of Legal-Tech. Dean Osofsky's over 50 publications focus on improving governance and addressing injustice in energy and climate change regulation. Dean Osofsky has collaborated extensively with business, government, and nonprofit leaders to make bipartisan progress on these issues through her leadership roles and teaching. Her professional leadership roles have included serving as President of the Association for Law, Property, and Society; chair of the American Association of Law School's Section on Property; and a member of the Executive Council of the American Society of International Law, the International Law Association's Committee on the Legal Principles of Climate Change, the Board of Governors of the Society of American Law Teachers, and the editorial board of *Climate Law*. Dean Osofsky received a Ph.D. in geography from the University of Oregon and a J.D. from Yale Law School. Prior to joining the Pennsylvania State University, Dean Osofsky served on the faculties of University of Minnesota Law School, Washington and Lee University School of Law, the University of Oregon School of Law, and Whittier Law School.

Global trends in climate change litigation: Climate change litigation has emerged over the last two decades, and especially the past several years, as an important regulatory driver. As of June 2019, cases have been brought in 29 countries plus the European Union and other regional and international tribunals

across 6 continents, with 1039 cases in the United States and 300 in other jurisdictions. The vast majority of these cases have focused on governmental action, with a substantial portion involving administrative challenges to coal-fired power plants. However, an emerging set of “next generation” cases bring more direct challenges to corporations and make rights claims, building on earlier efforts to advance such claims. This presentation will focus on exploring these trends and their implications for the regulatory impact of climate change litigation moving forward.

- Developments in climate change science and attribution of extreme events – *David Karoly, CSIRO*

David Karoly is Leader of the Earth Systems and Climate Change Hub in the Australian Government’s National Environmental Science Program, based in CSIRO. He is also an honorary Professor at the University of Melbourne. He is an internationally recognised expert on climate change and climate variability. Professor Karoly is a member of the National Climate Science Advisory Committee. During 2012-2017, he was a member of the Climate Change Authority, which provides advice to the Australian government on responding to climate change, including targets for reducing greenhouse gas emissions. He was involved in the Assessment Reports of the Intergovernmental Panel on Climate Change in 2001, 2007 and 2014 in several different roles. He was awarded the 2015 Royal Society of Victoria Medal for Scientific Excellence in Earth Sciences. From 2007 to February 2018, David Karoly was Professor of Atmospheric Science at the University of Melbourne and in the A.R.C. Centre of Excellence for Climate System Science. From 2003 to 2007, he held the Williams Chair in the School of Meteorology at the University of Oklahoma.

Developments in climate change science and attribution of extreme events: There have been significant advances in understanding the role of human-caused climate change in extreme weather and climate events over the last decade,¹ from very few studies to annual *Explaining Extreme Events from a Climate Perspective* supplements in *Bulletin of the American Meteorological Society*.² A comprehensive review and assessment of the scientific basis for the attribution of extreme events in the context of climate change was undertaken by the US National Academy of Science in 2016.³ Attribution of extreme events is essentially a signal-to-noise problem, where the signal is the expected response due to climate change and the noise is the natural variability of the climate system. The strongest climate change attribution statements for extreme events have been made for increases in the likelihoods (frequencies) of certain types of events, such as heat waves and extreme high temperatures, marine heat waves, and extreme high sea level and storm surges. Weaker attribution has been possible for extreme fire danger and heavy short-term rainfall. Attribution to climate change has not been possible for many types of extreme events, including hail and thunderstorms, tornadoes, tropical cyclones, and many droughts or floods.

- The Paris Agreement and its relationship to domestic climate governance – *Andrew Higham, Mission 2020*

Andrew Higham is the Chief Executive of Mission 2020. He was previously the senior advisor to Executive Secretary of the UNFCCC, responsible for negotiation strategy and for the drafting and delivery of the Paris Agreement and the relevant decisions of the COP from Durban until Paris. Prior to joining the United Nations, he was an international expert in climate policy at the Energy Research Centre of the Netherlands; Strategies Director and Vice President of the Australian Conservation Foundation; and for a decade worked as a senior political and policy advisor in Australia.

Abstract: Heralded as a breakthrough in multilateral diplomacy, the Paris Agreement ensured that 197 signatories now have at least one law or policy on climate change with more than 139 framework laws

¹ S. Marjanac & L. Patton, Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?, *J. Energy & Natural Resources Law*, **36**, 265-298, 2018. doi: 10.1080/02646811.2018.1451020.

² Explaining Extreme Events from a Climate Perspective, *Bull. Am. Meteor. Soc.*, 2012-2018. <https://www.ametsoc.org/index.cfm/ams/publications/bulletin-of-the-american-meteorological-society-bams/explaining-extreme-events-from-a-climate-perspective/>

³ *Attribution of Extreme Weather Events in the Context of Climate Change*, 2016. Nat. Acad. Sci., Eng., and Med., Washington, DC, USA. Nat. Acad. Press. doi: 10.17226/21852.

addressing climate mitigation or adaptation specifically and 28 laws directly referencing the Agreement itself.⁴ With climate relevant policies now accounting for 95% of global greenhouse gas emissions, litigation is a key *strategic tool* that can actively play a role in driving further implementation of the Paris Agreement and facilitate larger transitions towards a low-carbon economy.⁵ Understanding how these recent international legal developments under the Paris Agreement can provide new legal avenues for increasing climate commitments and the potential to engage a wider range of actors to enforce more ambitious climate action over time is key to driving the next generation of climate litigation cases. As a result, this presentation seeks to provide an overview of the key legal provisions within the Paris Agreement as well as provide an overview of some of the larger subnational trends that can help to enforce new approaches to cases globally and enhance climate commitments moving forward.

- Shifting attitudes to climate risk in the business and investor communities – *Simon O’Connor, Responsible Investment Association Australasia (RIAA)*

Simon O’Connor operates at the intersection of economics, finance and sustainability and has extensive international experience as an economic adviser, investment analyst and sustainability consultant across finance, corporate and not for profit sectors. In his CEO role, Simon works with RIAA’s 240 member organisations with the goal of delivering on RIAA’s mission of promoting, advocating for, and supporting approaches to responsible investment that align capital with achieving a healthy and sustainable society, environment and economy. As well as driving RIAA to be a more impactful organisation, Simon is active across the region and internationally in responsible investment and sustainable finance initiatives, as a member of the Global Sustainable Investment Alliance, sitting on the UN backed Principles for Responsible Investment (PRI) Australia Network Advisory Committee, as well as a member of the National Advisory Board on Impact Investing in New Zealand. Prior to joining RIAA, Simon spent over five years at the Australian Conservation Foundation (ACF) as their Economic Adviser, leading debates on issues such as financing the transition to a low carbon economy, climate change policy and broader economic reform issues (taxation, green jobs, infrastructure, wellbeing indicators & natural capital issues). He played an integral role in the establishment of Australia’s \$10 billion Clean Energy Finance Corporation, which continues to have a strong impact by investing in a low carbon future in Australia today.

‘First wave’ climate litigation – Adani, Rocky Hill and beyond: roundtable discussion

- Matt Floro, EDO NSW

Matt Floro is a Solicitor in the litigation team at EDO NSW, Australia’s leading public interest environmental community legal centre. Matt has worked in the public, private and not-for-profit sectors and has practised environmental and planning law in Queensland, Victoria and New South Wales. He teaches at various law schools in Sydney, including the University of New South Wales. Matt holds undergraduate degrees in Law and Economics and a Master’s degree in Law from the University of Queensland. He is currently undertaking a Master of Public Administration at Griffith University and a specialist Master of Laws in Environmental, Natural Resources and Energy Law at the Northwestern School of Law of Lewis and Clark College, Portland USA.

- Elisa de Wit, Norton Rose Fulbright

Elisa de Wit is an environment and planning, and climate change lawyer based in Melbourne. She heads Norton Rose Fulbright’s Australian climate change practice. Elisa has a detailed understanding of the National Greenhouse and Energy Reporting Scheme (NGERS), the Carbon Farming Initiative (CFI), Emissions Reduction Fund (ERF), the Renewable Energy Target (RET) and the Safeguard Mechanism and has provided extensive advice to a wide range of clients on the obligations and opportunities which flow from NGERS,

⁴ Nachmany, Michal and Setzer, Joana “Global trends in climate change legislation and litigation: 2018 snapshot” Grantham Research Institute May 2018.

⁵ Carbon Brief “Mapped: Climate change laws around the world” 11 May 2017 available at: <https://www.carbonbrief.org/mapped-climate-change-laws-around-world>

ERF and RET. In conjunction with RAMP Carbon, Elisa authored “Implementing the Carbon Farming Initiative – A Guide For Business” on behalf of the Carbon Market Institute. Elisa is the author of the CFI chapter for the Lexis Nexis Clean Energy Law in Australia service and was also an author of the CFI Legal and Contracts Guide prepared with funding from the Commonwealth Government’s CFI Extension and Outreach program, which was published in February 2014. She was named Climate Change Lawyer of the Year in Australia at the 2011 Legal Awards conducted by *Corporate INTL Magazine*.

- Sean Ryan, EDO Qld

Sean Ryan is EDO Qld's Principal Solicitor, responsible for the integrity of advice and casework. Having worked for all levels of government and a range of industries on broad ranging environmental issues, Sean brings a broad perspective to assisting the community and public interest. Sean worked for both government and in private consultancy before moving onto a six-year stint in private law practice with Corrs Chambers Westgarth. He joined EDO Qld in 2011. Sean has degrees in both law and environmental science as well as a Masters in Environmental Law from the University of Queensland.

- Samantha Hepburn, Deakin Law School

Professor **Samantha Hepburn** is the Director of the Centre for Energy and Natural Resources Law at Deakin Law School and a member of Deakin Energy. She teaches and researches in the area of energy and natural resources law, and has a strong public profile in these areas. Professor Hepburn has discussed and written about the *Adani* case and its implications upon a transitioning energy framework and climate governance extensively. She also recently produced a podcast on the project and its broader social, moral and environmental implications.

‘Second wave’ climate litigation – corporate accountability

- A new era of climate litigation in Australia? – *Andrew Korbel, Corrs*

Andrew Korbel is an experienced litigator and a trusted adviser to both the private sector and government. He has been in practice for more than 20 years, and has been a partner in the Sydney office of Corrs for the last 13 of them. Andrew works with Australian and foreign clients to resolve complex and high-value commercial disputes, and protects their interests in inquiries and investigations. He also works in the pro bono space, and in that capacity is the long-time leader of the Corrs arm of the Homeless Persons Legal Service.

A new era of climate litigation in Australia?: We are starting to see a rise, and a pivot, in litigation connected to climate change. The first wave of climate litigation in Australia focussed on approvals for developments of fossil-fuel projects. Now, a second wave is being added, seeking to force companies directly and indirectly affected by climate change risks (including the transitions needed to mitigate them) to assess and report on those risks. A third wave, not yet seen in Australia, is likely to come. In that wave, investors will seek to recover their losses from directors, auditors and advisers who have not confronted climate change risks. Separately, communities most affected by climate change are likely to litigate to try to force action by government and the largest emitters, and to seek damages from those they think might be held responsible for contribution, inaction, and obfuscation.

- Liability for misleading climate risk disclosure – *Sarah Barker, Minter Ellison*

Sarah Barker is Special Counsel at MinterEllison. Her work helps corporations and institutional investors manage dynamic environmental, social and governance risks through a corporate governance lens. She has particular expertise in the climate change-related exposures under corporate and securities (rather than 'environmental') laws - including directors' fiduciary duties and financial reporting/disclosure obligations. Sarah's work is at the forefront of international developments with institutions from the Bank of England,

United Nations PRI and the European Union, and allows her to provide practical, progressive advice to listed corporations, investors and government agencies in Australia.

- CBA and REST cases – *David Barnden, Equity Generation Lawyers*

David Barnden is a principal and director of Equity Generation Lawyers. He represents super fund member Mark McVeigh in a unique claim against an Australian superannuation fund trustee alleging failure to discharge fiduciary duties to members on climate risk. Before joining Equity Generation Lawyers, David was a principal at Environmental Justice Australia, a public interest environmental legal practice, where he specialised in climate and corporate law. He represented Guy and Kim Abrahams in the Federal Court of Australia against ASX-listed Commonwealth Bank in a landmark proceeding against a major bank for failing to disclose climate risks to shareholders. David has extensive experience in class actions involving corporate misconduct with plaintiff firm Maurice Blackburn. He has represented group members in proceedings against Nufarm, Gunns, Transpacific Industries Group, Treasury Wine Estates and Cash Converters International. He holds bachelor degrees in Law and Applied Science (Coastal Management).

- Reason and Lawfulness in the Climate Emergency: the Trial of Greg Rolles – *Nicole Rogers, Southern Cross University*

Dr **Nicole Rogers** is a Senior Lecturer in the School of Law and Justice at Southern Cross University, NSW. She completed her Law Degree with First Class Honours at the University of Sydney and holds a Masters of Law degree from the University of Wollongong and a Doctorate of Philosophy from Southern Cross University. Nicole was a founding member of the School of Law and Justice and is the lawyer on the Southern Cross University Human Research Ethics Committee, a position she has held since 2004. She writes and publishes in the areas of the intersection of performance studies theory and law, wild law/earth jurisprudence, climate change activism and climate change law, with a particular emphasis on climate change litigation. In 2014 she initiated the wild law judgment project, which she co-led for three years, and she co-edited the 2017 Routledge book, *Law as if Earth really mattered. The wild law judgment project*.

Reason and Lawfulness in the Climate Emergency: the Trial of Greg Rolles: In May 2019, in the Bowen Magistrates Court, climate activist Greg Rolles drew upon the Queensland codified version of the common law necessity defence, the so-called extraordinary emergency defence, in arguing that he was not guilty of several offences relating to the obstruction of the Aurizon railway line in November 2018. This was the first trial of a climate activist in which the extraordinary emergency defence has been raised. During the trial, a member of the Queensland judiciary heard scientific evidence that climate change constitutes an extraordinary emergency and that, therefore, the relevant acts of civil disobedience were justified under Queensland criminal law. Notwithstanding the plethora of recent official declarations of climate emergency and the evidence of an IPCC scientist, the magistrate held that climate change did not meet the criteria of extraordinary emergency within the ambit of the Criminal Code and imposed a heavy fine upon Rolles. In this paper, I explore the significance of the trial against the backdrop of current climate science modelling, recent political developments, and the history of judicial responses to the attempted use of the common law defence of necessity and its statutory equivalents by climate activists. I also consider the significance of a contemporaneous SLAPP suit launched by Aurizon in the Queensland Supreme Court against Rolles and various other Stop Adani activists.

Emerging and potential litigation in the Asia Pacific region

- Climate litigation and the contribution of the Global South and China – *Jolene Lin, NUS Law School and Jacqueline Peel, Melbourne Law School*

Jolene Lin's main areas of expertise are climate change law and transnational environmental law. Jolene is Director of the Asia-Pacific Centre for Environmental Law and a member of the advisory board for the University of Strathclyde's LLM in Climate Change Law and Policy. She is a member of the editorial boards of: *Journal of Environmental Law, Chinese Journal of Environmental Law, and Climate Law*. Before joining

NUS, Jolene was associate professor of law at the University of Hong Kong. Jolene has served as consultant to the Hong Kong Department of Justice, international NGOs, the United Nations Environment Programme, and global law firms. She has also served on the Hong Kong Appeal Tribunal Panel (Buildings Ordinance) and the Hong Kong Appeal Board Panel (Town Planning).

Climate litigation and the contribution of the Global South and China: Since the conclusion of the Paris Climate Agreement, climate litigation has become a global phenomenon. This global expansion gives substance to claims of a transnational climate justice movement with courts as important players shaping multilevel climate governance. However, most climate litigation scholarship and practitioner discussion focuses on court actions in developed countries of the Global North, with little analysis of climate cases in the Global South. Nonetheless, it is these countries—in Asia, the Pacific, Africa, and Latin America—that are among the most vulnerable to climate impacts. This presentation focuses on the Global South’s contribution to transnational climate litigation. It also considers the potential for climate litigation in China, which considers itself part of the Global South but is uniquely situated as the world’s largest GHG emitter. Its political economy, centred on the Communist Party, also sets it apart from many other jurisdictions where climate litigation takes place. We argue that analysis of the experience in the Global South and China is essential if transnational climate jurisprudence is to contribute meaningfully to global climate governance and to ensuring just outcomes for the most climate-vulnerable. Attention to the types of climate cases emerging in the Global South and China allows reframing of our understanding of transnational climate litigation to encompass suits that: raise climate issues “at the edge” rather than the centre of the litigation; frame claims in terms of constitutional and human rights; seek to hold governments to account for implementation and enforcement of existing climate policy goals rather than pursuing new or better climate laws; and advance climate change concerns via a “stealthy” strategy that recognizes judicial reluctance to engage politically-charged climate policy questions.

- Litigating non-human capabilities at a time of climate disaster – *Rosemary Lyster, Sydney Law School*

Rosemary Lyster is the Professor of Climate and Environmental Law at the University of Sydney Law School and a Fellow of the Australian Academy of Law. Rosemary’s special area of research expertise is Climate Justice and Disaster Law. She has published two books and numerous other publications in this area. Her books are Rosemary Lyster and Robert M. Verchick (eds.) *Climate Disaster Law* (Edward Elgar: 2018) and Rosemary Lyster *Climate Justice and Disaster Law* (Cambridge University Press: 2016). Rosemary has been selected by the Australian Financial Review as one of the 2018 ‘100 Women of Influence’ in the Public Policy category. In 2015, Rosemary was appointed by the Victorian government to a three person Independent Review Committee (IRC) to review the state’s Climate Change Act 2010 and make recommendations to place Victoria as a leader on climate change. The government accepted 32 of the IRC’s 33 Recommendations which were included in the new Climate Change Act 2017. In 2013, Rosemary was appointed a Herbert Smith Freehills Visiting Professor at Cambridge Law School and was a Visiting Scholar at Trinity College, Cambridge in 2009 and in 2014. In other areas of Environmental Law, Rosemary specialises in Energy and Climate Law and Water Law.

- Identifying climate litigation opportunities in or involving Australia – *Chris McGrath, barrister, Higgins Chambers*

Dr **Chris McGrath**, LLB (Hons), BSc, LLM, PhD, is a barrister in Queensland practising in environmental law and an Adjunct Associate Professor at the University of Queensland’s Global Change Institute.

Identifying climate litigation opportunities in or involving Australia: This presentation examines 10 key issues for identifying climate litigation opportunities in or involving Australia using a case study of how customary landowners in Papua New Guinea can sue Australia’s largest climate polluter, Loy Yang A Power Station in Victoria.