

## CONTENTS

*Preface and acknowledgments* page xi

<b>1</b>	<b>Why climate change litigation matters</b>	<b>1</b>
1.1	Introduction	1
1.2	What is climate change litigation?	4
1.3	Why climate litigation matters as part of climate governance	9
1.3.1	Regulatory gaps created by struggling international climate negotiations	10
1.3.2	Litigation as an element of multidimensional climate governance	13
1.3.3	Role of court decisions in shaping smaller-scale decision making	15
1.4	Climate litigation and regulatory pathways in the United States and Australia	16
1.4.1	Climate change litigation in the United States	19
1.4.2	Climate change litigation in Australia	20
1.4.3	How the United States and Australia compare	22
1.5	Outline of the book	25
<b>2</b>	<b>Model for understanding litigation's regulatory impact</b>	<b>28</b>
2.1	Introduction	28
2.2	Litigation as a regulatory tool	29
2.2.1	Proactive and antiregulatory litigation	30
2.2.2	Regulatory impact	32
2.3	Regulatory pathways for climate change litigation	35
2.3.1	Direct regulatory impacts	37
2.3.1.1	Constitutional interpretation	38
2.3.1.2	Statutory interpretation	40
2.3.1.3	Common law interpretation	45
2.3.2	Indirect regulatory impacts	47
2.3.2.1	Increasing costs and risks	48
2.3.2.2	Changing social norms and values	49
2.4	Conclusion	52

<b>3</b>	<b>Litigation as a mitigation tool</b>	<b>54</b>
3.1	Introduction	55
3.2	The “carbon economy” in the United States and Australia	56
3.3	US mitigation litigation–regulation linkages	60
3.3.1	International-level litigation–regulation linkages	60
3.3.2	National-level litigation–regulation linkages	62
3.3.2.1	Clean Air Act	63
3.3.2.2	Other environmental statutes	71
3.3.2.3	Common law approaches	76
3.3.3	State-level litigation–regulation linkages	78
3.4	Australian mitigation litigation–regulation linkages	83
3.4.1	International-level litigation–regulation linkages	83
3.4.2	National-level litigation–regulation linkages	86
3.4.2.1	Climate litigation prior to national climate change legislation	87
3.4.2.2	Advent and demise of national climate legislation in Australia	90
3.4.2.3	A new era of climate litigation in Australia?	94
3.4.3	State-level litigation–regulation linkages	96
3.5	Comparing mitigation litigation in the United States and Australia	104
3.6	Conclusion	106
<b>4</b>	<b>Litigation as an adaptation tool</b>	<b>108</b>
4.1	Introduction	108
4.2	The role of adaptation litigation in Australia	112
4.2.1	Climate change impacts in Australia	113
4.2.2	Government action to address adaptation in Australia	116
4.2.3	Australian adaptation litigation	120
4.2.3.1	Adapting to coastal impacts	122
4.2.3.2	Responding to increasing disaster risks	131
4.2.3.3	Liability for climate change harms	134
4.3	Emerging adaptation litigation in the United States	143
4.3.1	Climate change impacts in the United States	143
4.3.2	Government action to address adaptation in the United States	146
4.3.3	US adaptation litigation	150
4.3.3.1	Earlier litigation with some connection to adaptation: Endangered Species Act and natural disaster tort cases	151
4.3.3.2	Emerging cases addressing adaptation planning	154

4.4	Comparing adaptation litigation in Australia and the United States	166
4.5	Conclusion	169
<b>5</b>	<b>Corporate responses to litigation</b>	<b>173</b>
5.1	Introduction	173
5.2	Corporate climate change responses	176
5.2.1	Drivers of corporate climate action	178
5.2.2	Litigation risk as a component of corporate climate risk management	182
5.3	Sectoral responses to climate litigation risk	185
5.3.1	Energy	186
5.3.2	Land use	199
5.3.3	Insurance	202
5.3.4	Finance and investment	207
5.3.5	Law firms and other professional advisors	216
5.4	Conclusion	219
<b>6</b>	<b>Litigation's role in shaping social norms</b>	<b>221</b>
6.1	Introduction	221
6.2	Litigation and public perceptions of climate change	224
6.2.1	Public attitudes to climate change: United States and Australia	224
6.2.2	Role of litigation in shaping public perceptions of climate change	233
6.2.3	Partisan politics and regulatory responses to climate change litigation	241
6.3	Courts as sites for public debates over science and regulatory scale	249
6.3.1	Science, scale, and law in the climate decisions of the US Supreme Court	251
6.3.2	Scaling "local" in Australian cases on scope 3 emissions	255
6.3.3	How US and Australian courts compare as forums for consideration of science	260
6.4	Conclusion	264
<b>7</b>	<b>Barriers to progress through litigation</b>	<b>266</b>
7.1	Introduction	266
7.2	Barriers to court access	269
7.2.1	Separation-of-powers barriers	270
7.2.2	Cost barriers	279

7.3	Antiregulatory litigation	283
7.3.1	Challenges to federal regulatory action	285
7.3.2	Challenges to state regulatory action	290
7.4	Resistance to and backlash against litigation	300
7.5	Conclusion	308
<b>8</b>	<b>The future of climate change litigation</b>	<b>310</b>
8.1	Introduction	310
8.2	What has been achieved by pro-regulatory climate change litigation	311
8.2.1	Contribution of US climate change litigation	312
8.2.2	Contribution of Australian climate change litigation	317
8.2.3	Explaining divergences between the US and Australian litigation experience	321
8.3	Future pathways for climate change litigation	324
8.3.1	United States	324
8.3.2	Australia	332
8.4	Conclusion: litigation and our climate change future	338
	<i>Index</i>	341