## CONTENTS

1		,	nate change litigation matters 1		
			luction 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		ate litigation and regulatory pathways in the United States australia 16		
		1.4.1	Climate change litigation in the United States 19		
			Climate change litigation in Australia 20		
			How the United States and Australia compare 22		
	1.5	Outlin	ne of the book 25		
2	Mo	odel fo	or understanding litigation's regulatory impact	28	
	2.1	Intro	duction 28		
	2.2	Litiga	tion as a regulatory tool 29		
		2.2.1	Proactive and antiregulatory litigation 30		
		2.2.2	Regulatory impact 32		
	2.3	Regul	latory 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	Cana	lusion 52		

3		ation as a mitigation tool 54	*
		atroduction 55	
	2.2 110	he "carbon economy" in the United States and Australia	56
	3.3 03	S mitigation litigation–regulation linkages 60	
	3.3	3.1 International-level litigation-regulation linkages	60
	5.3	3.2 National-level litigation–regulation linkages 62	
		3.3.2.1 Clean Air Act 63	
		3.3.2.2 Other environmental statutes 71	
	2.2	3.3.2.3 Common law approaches 76	
	3.3	3.3 State-level litigation–regulation linkages 78	
	3.4 Aus	stralian mitigation litigation–regulation linkages 83	
	3.4		83
	3.4	4.2 National-level litigation—regulation linkages 86	
		3.4.2.1 Climate litigation prior to national climate ch	ange
		legislation 87	
		3.4.2.2 Advent and demise of national climate legisla	tion
		in Australia 90	
	400	3.4.2.3 A new era of climate litigation in Australia?	94
	3.4.	.3 State-level litigation-regulation linkages 96	
	3.5 Con	mparing mitigation litigation in the United States	
		Australia 104	
	3.6 Con	nclusion 106	
4	Litigati	ion as an adaptation tool 108	
		roduction 108	
	4.2 The	role of adaptation litigation in Australia 112	
	4.2.1	1 Climate change impacts in Australia 113	
		2 Government action to address adaptation in Australia	116
	4.2.3	3 Australian adaptation litigation 120	110
		4.2.3.1 Adapting to coastal impacts 122	
		4.2.3.2 Responding to increasing disaster risks	3.1
		4.2.3.3 Liability for climate change harms 134	/1
	4.3 Emer	erging adaptation litigation in the United States 143	
	4.3.1	Climate change impacts in the United States 143	
	4.3.2	2 Government action to address adaptation in the	
		United States 146	
	4.3.3	B US adaptation litigation 150	
		4.3.3.1 Earlier litigation with some connection to adap	tation.
		Endangered Species Act and natural disaster to	rt
		cases 151	
		4.3.3.2 Emerging cases addressing adaptation planning	15

## CONTENTS

	4.4	Comparing adaptation litigation in Australia and the United States 166				
	4.5	Conclusion 169				
5	Co	rporate responses to litigation 173				
		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				
6	Lit	igation's role in shaping social norms 221				
		Introduction 221				
	6.2	.2 Litigation and public perceptions of climate change 22				
		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				
7	Baı	riers to progress through litigation 266				
	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				

6

7

	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	
8	The future of climate change litigation 310	
	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	
	Index 341	