

# SCENE SET FOR ERIN BROCKOVICH-STYLE MASS COURT CLAIMS

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Legal Briefings - By **Jason Betts** and **Christine Tran**

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Most Australians are familiar with a class action involving contaminated water made famous by the Hollywood films *A Civil Action* and *Erin Brockovich*.

The latter claim against power company, Pacific Gas, secured damages of \$US333 million - one of the biggest US settlements at the time.

Environmental class action litigation has dominated litigation growth in the United States and Canada for years. The scene is set for these kinds of cases - focused on economic loss - to grow in Australia.

Having traditionally taken a backseat to shareholder and consumer class actions, environmental toxic torts are firmly back on the litigation agenda in Australia. Class action promoters such as IMF Bentham, Shine Lawyers and Slater & Gordon are already investigating possible environmental toxic tort class actions in Australia and that trend can be expected to continue. By shifting away from personal injury to economic loss claims, these actions may have a greater chance of success.

There is increasing publicity about the alleged adverse health effects of chemicals used in Australia across a range of industries, including fire suppression foam, fabric protectants and industrial insulators. Product innovation has increased the prevalence of synthetic chemical substances in Australia, sparking the interest of plaintiffs' law firms and class action funders to explore the possibility of environmental toxic tort class actions alleging contamination of the surrounding environment.

In Australia, toxic torts traditionally targeted personal injuries said to be caused by exposure to chemical substances and pollutants. This type of claim is a nice fit for the class action vehicle: alleged damage to a large number of people or even entire communities; potential social impacts that attract media attention; and claims that are too expensive to run individually, but in aggregate justify the costs of class action proceedings.

Yet despite this fit, toxic torts have been slow to gain a foothold in the Australian litigation environment, predominantly because the links between chemical exposure and personal injury have been tenuous, relying on difficult or developing epidemiological and scientific evidence.

## **CLAIMS RISKIER THAN OTHERS**

In many cases the harms manifested – cancers, infections, birth defects – are present in normal populations and therefore cannot be persuasively traced back to the chemical exposure. Confounding factors also arise, for example individuals exhibiting hereditary risks to certain diseases or pre-existing conditions that complicate the causal analysis. This makes the claims riskier than other forms of class actions, and less attractive to plaintiffs' law firms and funders as a result.

Aware of these pitfalls, promoters of the next wave of toxic tort class actions have adapted by concentrating on economic loss, rather than personal injuries. Beyond the potential human effects, the leakage or release of toxic substances into groundwater and waterways has the capacity to impair property values, spoil livestock and impede marine and fishing activities. This may translate into economic loss for local property owners and business (e.g. farmers, fishermen, tourism-related operators) impacted financially by the contamination. Broader economic loss may exist, particularly if contaminations adversely affect the local economy or reduce existing services available to residents, further impairing property values.

Australian companies may be vulnerable to environmental claims alleging private nuisance given that the law has long recognised claims relating to the emission of odours, dust and chemical particles, noise and other pollutants. Potential liability is not limited to those who created the pollution, but may apply to companies that have adopted it, negligently permitted it to continue, or failed to remedy the nuisance.

Given some of the forecast growth in consumer contact claims – a predicted area of exponential growth – has been dampened by the High Court's recent bank fees decision, environmental toxic torts may become an area of focus and growth for promoters of class actions looking for new frontiers. Funders will certainly be buoyed by the recent Full Federal Court decision in support of a "common fund" doctrine, which makes it easier to bring such claims on a funded basis. Australian corporations would be wise to take stock of their environmental compliance measures.

\*This article was first published in the Australian Financial Review\*

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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