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## \$22M PFAS class action settlement wins court OK



[Class Actions](#) 2023-06-19 4:05 pm By [Cindy Cameronne](#) | Sydney

A judge has approved a \$22 million settlement in a class action on behalf of a First Nations community that alleges their land was contaminated by toxic firefighting foam at a military base in Jervis Bay, citing the “very real” risks the case would face at trial.

The settlement approved by Federal Court Justice Michael Lee, which compensates group members for property damage and cultural harm, includes \$5 million in legal costs for class action law firm Shine Lawyers.

The judge said there was “no doubt” the sum was within a fair and reasonable range for group members. The settlement

Shine estimates that after distribution costs, the 896 group members will receive a total of at least \$16.5 million.

Justice Lee said the class action raised “complex and difficult questions” that would make a trial risky, including whether the Department of Defence knew the PFAS chemicals could damage lead applicant Wreck Bay Aboriginal Community’s lands while it was using them.

The case also raised a “novel claim” for damages to compensate cultural and traditional harm, which had been considered in other areas of law such as native title law but not in the context of a class action for property damage, Justice Lee said.

“I think those risks pointed out by the barristers are very real ones,” the judge said.

Justice Lee acknowledged 39 objections had been sent by group members that detailed “how deeply the community feels about the contamination of the land and the spiritual and cultural damage” it allegedly caused.

“It is understandable that members of the community will feel a great wrong has been done,” he said.

“There is a difference between an event happening which people consider is wrong and a claim at law.

“If the case went to a hearing and did not settle, I would be required to decide it according to law, not what is fair...[which] might mean no money is recovered or significantly less than offered [is recovered].”

While the judge said Australian property law had developed to encompass the cultural connection to land by First Nations people, the class action faced difficulties in proving the government’s liability and quantifying how much such a connection was worth in monetary terms.

“I don’t want anyone thinking there is something wrong with our system of law...there is a genius in the common law which allows it to develop...with respect to changing notions of property and particular types of property,” he said.

“The issue at the end of the day is proving liability on behalf of the Commonwealth...and also, importantly, working out what that is worth by way of money because money is the only way the common law has in order to quantify damage.”

In approving the \$5 million in costs, the judge said they were “within what would be expected for a complex case like this”.

## **A ‘complicated and hard case’, says class action barrister**

Counsel for the class action, William Edwards SC, said the case was based on the Wreck Bay community’s “ancient connection to their country”, which was valuable but not known to common law at the time it was developed.

“To bring the case in this court...we are going to have to show that the English legal system could encompass impacts to the community’s connection to their country and the impacts they feel arose from the PFAS contamination,” said Edwards.

“We were going to have to show that the English legal system...was broad enough to encompass these very important connections to country, which the English legal system did not know about at the time those doctrines and legal principles were developed.”

It was also difficult to quantify how much the Wreck Bay community’s connection to their land was worth financially, Edwards said.

“In many ways it seems incongruous or even inappropriate to put a dollar value on something which community members consider to be so priceless...but that’s all the court can do with these types of claims. They are claims for money,” Edwards said.

Edwards also argued there was a “real risk” the class action could lose completely at trial, including that the judge may have accepted evidence from the government that it stopped using PFAS foam in 1996 or 1997, before it could have known it was a hazard.

“This was a complicated and hard case, with frankly a lot of obstacles in it,” Edwards said.

## **Community ‘deeply affected’ by alleged contamination**

Wreck Bay community member Ashley Williams appeared in court on Monday to object to the settlement, saying her community was “deeply affected” by the alleged PFAS contamination.

“It has become a conduit of toxic chemicals, not only ruining our land but our very lives,” she said.

The alleged contamination had caused “immeasurable damage” and “profound voids” in the community’s cultural heritage, Williams said.

Williams said she and her family had experienced health complications they attributed to the PFAS contamination, meaning her children could no longer engage in traditional

cultural activities on the land.

“Those experiences are not just recreational, they were important to my identity...my profound connection between my land and culture,” she said.

The case will be referred to barrister Joshua Creamer, who is a Waanyi and Kalkadoon man, to decide which group members should receive money from the settlement and how much they should be paid.

## **Wreck Bay class action the last PFAS claim to settle**

Shine brought the class action against the Department of Defence in February 2021, alleging a substance in the firefighting foam, known as PFAS, leached into soil and waterways, damaging culturally significant sites in Wreck Bay and decreasing the value of the land.

The settlement marks the resolution of the last remaining class action against the federal government over contamination of land by allegedly toxic firefighting foam.

A multi-site class action against the government led by representative applicant Reanna Haswell over alleged contamination in regional NSW [settled on the night before trial](#) was due to start on May 15 for \$132.7 million.

That settlement came after [Justice Lee expressed frustration](#) in a case management hearing in April that the case had not resolved, despite the resolution of similar group proceedings almost three years ago.

The first three class actions over PFAS were settled in 2020 for \$212.5 million, the biggest class action settlement of that year.

Two of the class actions were brought by Shine on behalf of property owners living in Katherine in the Northern Territory and Oakey in Queensland. The other lawsuit was launched by Dentons on behalf of residents of Williamtown in New South Wales.

The class action is represented by William Edwards SC, Ryan May, Kathleen Morris, Peter Gaffney and Stephen Puttick, instructed by Shine Lawyers. The Commonwealth is represented by Sophie Callan SC, Edward Muston SC, Catherine Gleeson, Oliver Jones, Catherine Hamilton-Jewell, Henry Cooper and Anya Poukchanski, instructed by King & Wood Mallesons.

The Wreck Bay case is [Wreck Bay Aboriginal Community Council & Anor v Commonwealth of Australia](#).

The NSW multi-site case is [Reanna Laura Haswell & Anor v Commonwealth of Australia](#).