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Court to decide Alcoa jurisdiction

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A PENNSYLVANIA court is expected to decide next month whether a blockbuster Australian lawsuit backed by environmental crusader Erin Brockovich — involving all-Australian plaintiffs alleging harm in Australia — can be heard in the US.

Two years since Ms Brockovich visited Western Australia and declared “there is something going on here” after she met residents living near Alcoa’s Wagerup alumina refinery in the southwest, civil proceedings have been filed in a Pittsburgh court.

The case revolves around 240 West Australians who are suing Alcoa over illnesses and injuries they allege were caused by toxic emissions from the Wagerup refinery.

Brisbane-based Shine Lawyers, which represents them, said the decision to take the case to an American court was due to Alcoa having its headquarters in Pittsburgh.

But the decision to bypass the Australian justice system has sparked debate among law experts.

Clayton Utz partner Stuart

Clark slammed the tactic as blatant “forum shopping” to try to enhance prospects of a win.

Mr Clark, who co-chairs the American Bar Association’s international class actions committee, said the strategy was increasingly common with lawyers across the globe now targeting the US as an easier jurisdiction loaded with fatter fees and payouts.

“It’s a blatant attempt by entrepreneurial lawyers in the US to take advantage of a system which is loaded in favour of plaintiffs to achieve an outcome which may not necessarily be available to them in Australia,” Mr Clark told *The Australian*.

Shine has teamed with two US law firms — Caroselli, Beacher, McTiernan & Conboy, and Girardi & Keese — and Ms Brockovich to run the case.

The West Australian plaintiffs claim they suffered cancers, heart complications and sinus and skin problems from the emissions at the Wagerup refinery.

Ms Brockovich has likened it to the Hinkley case, which made

her a household name after Julia Roberts portrayed her in the Oscar-winning film about her role building a lawsuit against American energy giant Pacific Gas and Electric.

The then legal clerk linked contaminated drinking water to cancers, organ failure and birth defects in the Californian town of Hinkley. The case was settled in 1996 for \$US333 million.

Alcoa spokesman Kevin Lowery said the case would be vigorously defended but he declined to comment on the tactic of using an American court.

“We’re not going to try to surmise someone’s intentions and will leave it to rational people to see what the real situation is,” Mr Lowery said.

“Alcoa of Australia will defend itself but this case has no merit.”

Law experts say there would be a clear expectation the case had better prospects for success in the litigious US.

University of Western Australia law professor Alex Gardner said there were considerable differences between the laws of the US and Australia.

“The United States has a significant history of what we’d call toxic torts litigation where there’s pollution causing illness to a lot of people,” he said.

“Those suits within the US, that is American-based suits, are not so difficult and it may be that there’s a sense that the American law is more advanced and well-developed in principle than the Australian law on those issues.”

Sydney University law professor Gerry Bates said claims for personal harm from emissions were not easy to prove and even where cause and effect could be established, legal liability was problematic because it was based on reasonable foresight of the



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consequences and whether a duty of care was met.

“Perhaps the lawyers consider that this would be easier to establish in the litigious US,” Dr Bates said.

In a tantalising glimpse of the way the case will run, US lawyer William Caroselli released a statement saying Alcoa knew its processes could be hazardous.

“This is what happens when big corporations put their bottom line ahead of the public safety,” Mr Caroselli said.

“As a result of their negligence, recklessness and deceit, there are a lot of sick people who, through no fault of their own, are fated to live lives full of illness, pain and suffering.”

Mr Clark said there were potentially huge rewards for US lawyers acting on contingency

fees to bring foreign cases to America, where verdicts were generally decided by juries rather than judges.

“Bear in mind that if they are successful they will take upwards of 40 per cent of any verdict,” he said. “The other issue is that there is the prospect in the US of a court awarding punitive damages. In Australia, we rarely, if ever, award punitive damages, and where they have been

awarded, the sums of money are nothing like those in the US.

“There is certainly a tendency for lawyers who realise that they have a hopeless case in, say, Australia to try to use the US jurisdiction where a completely different set of rules will apply.”

Shine executive director Simon Morrison did not return repeated calls from *The Australian*.