

# GREENPEACE

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45D An Environmental Threat

Briefing Paper Number 1

Greenpeace Australia May 1991

## BHP vs GREENPEACE - A BATTLE FOR THE FUTURE

BHP's recent attempt to use section 45D of the Trade Practices Act to silence Greenpeace is a new and worrying development in the growing and increasingly important environment debate within Australia. The "Big Australian" attempted to use its huge financial and corporate muscle to stop the Rainbow Warrior and Greenpeace Australia from campaigning to protect our oceans and coasts from the dangers posed by oil drilling. This backgrounder provides an overview of why BHP is so threatened by the public's concern for the environment and why Greenpeace believes that BHP's attempt to use s.45D is a watershed in the fight for an environmentally secure future.

### THE EVENTS OFF WARRNAMBOOL

Over three days in late March 1991 the Greenpeace flagship, Rainbow Warrior campaigned in the ocean off Warrnambool, Victoria against BHP exploring for oil in the sensitive calving grounds of the endangered Southern Right Whale. Using traditional, strictly non-violent methods of direct action, crew members of the Rainbow Warrior attempted to convince BHP to stop its oil exploration program in this area.

It was made very clear to BHP, the master of BHP's seismic exploration ship and to the Federal Police that Greenpeace was committed, in this as in all cases, to not endangering other people's lives or property.

What was endangered however was BHP's public reputation. With the national media focussing on the company's oil exploration activities and the inherent dangers posed by an offshore oil program, BHP lashed out.

Embarrassed at having its environmental credentials questioned, and determined to stop this threat to its billion dollar offshore oil plan, BHP postponed its oil exploration program and sailed into harbour, and into the Federal Court.

### OIL, OIL, EVERYWHERE

The Rainbow Warrior's action was designed to promote debate about the plans of the federal government and big oil companies for a rapidly expanded offshore oil program. This ill-conceived program was introduced with the complete absence of any public consultation, no full or proper Environmental Impact Assessment or ecological studies. It is true to say that without Greenpeace's intervention into this cosy arrangement, the public would still be unaware of the program's implications.

In July 1990 the Federal Minister for Resources, Alan Griffiths, revealed a government strategy to promote offshore oil exploration

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throughout virtually the entire Australian marine environment. This 'Offshore Oil Strategy' provides multinational oil companies access to the vast majority of Australia's marine environment. In doing so the oil strategy opens up many of Australia's most sensitive and important marine areas to the threat posed by oil exploration and development. These sensitive marine areas include waters adjacent to the Great Barrier Reef Marine Park, Lord Howe Island and the proposed Shark Bay World Heritage Area.

In February 1991 the first exploration licence under this strategy was granted to BHP for the Otway Basin, near Warrnambool. This licence requires that BHP undertake extensive seismic testing and the drilling of at least eight exploratory wells over the next six years. Legal advice obtained by Greenpeace indicates that under the Petroleum (Submerged Lands) Act of 1967 a licence to explore for oil appears to automatically confer the right to develop and extract oil if it is discovered. Indeed, this is BHP's view. In the October 1990 issue of "BHP Petroleum Review", the company states "on completion of the seismic, BHP Petroleum has the right to earn a controlling interest in any or all the permits by the drilling of a well in the permit."

This right provides the oil industry with resource security similar to but even more dangerous than that recently obtained by the timber industry. While an EIS may be conducted before commercial extraction of oil can occur it is, in reality, a rubber stamping exercise. In the event that an EIS finds that the development should not proceed then the federal government has two options - ignore the findings of the EIS or pay compensation to the company concerned for the loss of their right to develop the deposit. Thus, the Government will be forced to buy back the rights to a public asset.

#### WHY GREENPEACE IS OPPOSED TO THE OFFSHORE OIL STRATEGY

Greenpeace is opposed to the present offshore oil program for two reasons. Firstly, the reality of the Greenhouse Effect and resulting climate change demands that we reduce our dependence on fossil fuels such as oil. In the total absence of a National Energy Conservation Strategy, the Government's "Offshore Oil Strategy" will only serve to increase and perpetuate our dependence on oil with all the associated environmental, economic and political consequences.

Secondly there is no program in place to protect the Australian marine environment. Greenpeace recognises that there are no instant solutions to the environmental threat posed by oil and we do not expect the world to suddenly stop using oil. However it is unacceptable that oil companies, driven by greed and self-interest, are allowed to plunder our national resources for short term profit, while no strategy is in place to reduce our wasteful use of energy or to protect our coast.

#### The Greenhouse Threat and the Need for a "Rational Energy Strategy"

Global Warming is now recognised as fact. The world is going to get warmer, causing major climatic changes. Greenpeace is demanding that a 'Rational Energy Strategy' for Australia be developed. Such a strategy should examine our use of fossil fuels like coal and oil and develop a program to reduce our use of these dangerous energy sources while increasing our use of environmentally safer, and technologically available, alternatives. The importance of a Rational Energy Strategy is

highlighted by the urgent need to reduce our emissions of greenhouse gases, a fact the federal government has recognised by introducing a 20% reduction target by the year 2005. While Greenpeace welcomes the target decision, it is vital to recognise that it is not an end in itself and can only be viewed as the first of many steps in the right direction.

The introduction of the 'Offshore Oil Strategy' can only be viewed as a backward step. It indicates that, despite its greenhouse gas reduction targets, the government is still approaching Australia's environmental protection in an illogical and short-sighted way. Global Warming is a fact and its effects may well be devastating to the planet. To ignore this reality and to charge ahead on a path of massively expanded oil use, while alternatives are available, amounts to environmental suicide.

### Protecting the Oceans.

With the exception of the Great Barrier Reef Marine Park, less than 1% of Australia's coastline is afforded any form of protection. With the multitude of threats posed to our coastline, and the oceans in general, it is a tragedy that there is no national program to protect them. All the more so when we consider that, as an island nation, we draw so heavily from our oceans and coastline for our economic base and cultural heritage. The threat posed by oil, while being only the latest in a series of threats, is frightening because of the scale of both the federal government and the oil industry's plans.

Oil drilling and extraction can cause serious and long term damage to the marine environment and consequently to the fishing and tourism industries. The technology simply does not exist to prevent or effectively contain oil blow outs or spills that occur as a result of the offshore drilling and transport of oil. The effects of such spills are well established. While a big oil spill is clearly the most visible and understood danger, the environmental effects of offshore oil drilling, even without any accidents, are very damaging to the marine environment.

### WHAT AUSTRALIA SHOULD DO

Greenpeace has expressed its concerns over the implementation of the 'Offshore Oil Strategy' to industry and to the federal government on a number of occasions. Greenpeace believes that a moratorium should be placed on further offshore oil exploration and drilling at least until:

1. A National Program for Marine Protected Areas is devised and implemented, as promised by Prime Minister Hawke at the International Union for the Conservation of Nature (IUCN) meeting in November 1990. Greenpeace, in consultation with scientific and government experts, drew up the outline and approach that such a program could take and presented the results to the Government in early 1990.
2. A Rational Energy Strategy is developed and implemented which takes account of the ecological realities of the Greenhouse Effect. Greenpeace has written to the Prime Minister outlining the concrete and practical steps that the Federal Government could take now as part of such a strategy. There is sufficient information and adequate technology to act immediately.

### WHY BHP FEELS SO THREATENED BY THESE ENVIRONMENTAL ISSUES.

BHP's corporate plan for the 1990's includes a billion dollar oil exploration and development program. Under current plans, BHP's corporate profits depend on a short term "asset stripping" approach to our natural resources, regardless of the wider environmental costs and national interest. BHP's response to the environmental threats we all face is to try to silence Greenpeace.

On March 27 immediately following the Rainbow Warrior's direct action, BHP and Western Geophysical, a U.S. company, sought and received a Federal Court temporary injunction prohibiting the Rainbow Warrior and any other Greenpeace vessels from going within three nautical miles of the oil exploration vessel, the Western Odyssey. Not satisfied with just keeping the Rainbow Warrior at bay, BHP applied to the Federal Court on March 28 for permanent and extraordinarily wide ranging injunctions to prevent Greenpeace and the Rainbow Warrior from undertaking virtually any activity against their oil exploration program. BHP decided to pursue its legal action under Section 45D of the Trade Practices Act. The "Big Australian" was also seeking punitive damages. As well as silencing Greenpeace, BHP was attempting to cripple the organisation financially. With a billion dollar oil exploration program at stake, BHP could easily afford to spend a few million dollars if it got Greenpeace out of the way.

As well as the threat to Greenpeace and the marine environment, BHP's decision to take legal action under s.45D introduces a new and concerning precedent into the arena of environmental debate in Australia. Although they have discontinued their current legal action the threat of the potential future use of 45D to stop legitimate protest is still great.

#### 45D - An Environmental Threat?

BHP's recent attempt to use 45D against Greenpeace was an attempt to extend the draconian powers of these two sections of the Trade Practices Act out of the industrial arena and into the fight to save the planet.

The BHP action had it proceeded would have established a legal precedent for any company to take similar action against virtually any environmental organisation or group of more than two people acting directly against an environmental threat. Forestry protests, residents blockades against polluting factories, consumer boycotts; the list of potential applications is endless. It could apply to not only environmentalists but consumer groups, Aboriginal communities and anyone else in the community that may ever have cause to come up against corporate Australia.

Although this specific action against Greenpeace has been withdrawn the attempted use of 45D represents a new and extremely powerful weapon for those in industry who wish to protect their "right" to pollute and damage the environment.

#### GREENPEACE'S RESPONSE

Greenpeace will now campaign, in conjunction with a wide range of organisations, to ensure that 45D is not used as a weapon to stifle legitimate concern or opposition to the activities of big business in Australia.

BHP's attempt to silence Greenpeace has backfired. Greenpeace will continue to fight for the protection of the planet. BHP is merely the latest in a long line of corporations and governments around the world that have sought to prevent Greenpeace from exposing those that seek to profit from the destruction of the environment. Greenpeace is not "anti-industry". We will continue our work with those Australian and multinational companies which are working to develop long term viable industries based on environmentally acceptable principles. While not perfect, these companies, unlike BHP Petroleum, at least recognise that environmental realities must be taken into account. It is this approach that will provide long term jobs and economic security for Australia.

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45D - An Environmental Threat

Briefing Paper Number 2

Greenpeace Australia, May 1991

## SECTION 45D OF THE TRADE PRACTICES ACT - ITS HISTORY AND THE FUTURE IMPLICATIONS OF BHP'S ATTEMPT TO EXTEND ITS APPLICATION TO ENVIRONMENTAL PROTESTS.

In 1977 the Liberal Government under Malcom Fraser introduced legislation into Federal Parliament to insert two new clauses into the Trade Practices Act. The clauses were Sections 45D and 45E and their passing into law was to change the face of Australia's industrial relations system.

The effect of these two sections is to make illegal any activity in which two or more people interfere with the supply of services by one company to another. In particular Section 45D deals with what are described as secondary boycotts. A secondary boycott is defined under the Trade Practices Act, as a situation when two people act in concert to prevent one company providing a service to another.

In any one week, the Trade Union movement is the recipient of three or four 45D applications. While they are normally directly related to industrial action, the application of 45D has, prior to BHP commencing proceedings against Greenpeace, been used to effectively threaten trade unions acting in support of environmental issues.

In October 1981, the Seamens Union placed bans on handling yellow cake from the Mary Kathleen uranium mine. This ban was in keeping with official ACTU policy of the time. Mary Kathleen Mines won an injunction under section 45D restraining the union from further action and seeking \$435,000 for loss of profits resulting from the ban. In an ACTU sponsored deal, the Seamens Union lifted its ban in return for the company dropping its damages claim. So ended the trade union industrial campaign against the uranium industry.

### Potential Applications - An Issue of the Right to Protest

The attempted 45D action by BHP against Greenpeace highlighted the potential extension of the draconian powers of these two sections of the Trade Practices Act out of the industrial arena and into the fight to save the planet.

Legal advice obtained by Greenpeace, from the Melbourne legal firm of Holding Redlich, clearly identifies examples of how Section 45D could be used against environmental and aboriginal protest.

- "4.1 In 1977 Mr. M. Aherns at a seminar dealing with what was then an untested Section 45D gave an example, outside the industrial sphere, of conservationists opposed to mining by a company on Fraser Island sitting in front of tractors operated by drivers under contract to the company. These persons (as there must be more than one) commit a Section

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45D offence and could be liable in damages to the company.

4.2 Another similar example would be conservationists opposed to lumber operations by a company in a particular forest who sit in front of trucks operated by drivers under contract to the company.

4.3 A further example could be traditional Aboriginal land owners opposed to mining operations by a company on their land who blockade access to the land to a company contracted to the mining company to undertake testing on the land, where the company holds a valid mining permit.

4.4 Numerous examples of this type could be given and could realistically prove a substantial bar to such groups undertaking what they regard as legitimate forms of public protest. All that is required is that the elements of 45D be satisfied."

### Conclusion

BHP's action against Greenpeace would have been a test case and had it been successful could have established a dangerous legal precedent. Such a precedent would enable any company to take similar action against virtually any organisation or collection of individuals acting directly against any of that company's activities which pose an environmental threat. The potential for widespread use of s.45D outside the industrial arena to prevent forestry protests, residents' blockades, consumer boycotts or any activity that threatens corporate Australia, is substantial.

Had BHP's legal action been successful, a powerful weapon would have been delivered to those who wish to stifle the actions of those who draw attention to injustice, be it environmental, human or consumer orientated. A regressive and dangerous legal precedent would have been established, the consequences of which should concern all Australians concerned with freedom of speech and the right to peaceful protest.

Although BHP has withdrawn its legal action against Greenpeace the threat posed by the possible extension of this clause 45D in order to stifle environmental protest remains. As the legal firm Holding Redlich stated in its advice to Greenpeace;

" the use of 45D in the manner in which BHP has attempted to use it constitutes a grave threat to direct action groups throughout the country which engage in direct confrontation with corporations engaged in conduct which they oppose."

Greenpeace has established dialogue with consumer organisations, the environment movement, Aboriginal organisations, sections of the Trade Union movement, the Australian Democrats and of course, civil libertarians regarding the threat posed by the existence of 45D. Due to the potential for further use of 45D to prevent peaceful protest Greenpeace intends to pursue, with the help of these other concerned sections of the community, the repeal of sections 45D and 45E of the Trade Practices Act.