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Greenpeace Australia Pacific Limited
Level 2
33 Mountain Street
Ultimo NSW 2007

Attention: Ms T Harrup

By email: trish.harrup@greenpeace.org

CONFIDENTIAL LEGAL ADVICE

Dear Ms Harrup

SHEN NENG 1

1. Thank you for seeking our advice in relation to the potential for businesses and persons in Hervey Bay to seek compensation in the hypothetical event that they suffer loss or damage as a result of coal spillage from the Shen Neng 1 during the current salvage operation.

Limitations of this advice

2. Please note that our advice below is based on limited instructions and we have had to make certain assumptions. We also note that you have asked us to provide this advice in a very short time frame. We have not had the opportunity to consider the complex legal issues that arise in this hypothetical scenario in depth. Our initial views are set out below.
3. This advice does not include a consideration of maritime law and any rights that may arise under maritime law. We do not have expertise in that area.

Instructions/assumptions

4. This advice is based on the following instructions and assumptions:
 - (a) The ship is owned by Shenzhen Energy Transport Co Ltd ("Shenzhen Energy"), which we assume is related to Shenzhen Energy Group Co, Ltd, a company listed on the Shenzhen Stock Exchange in China.
 - (b) The cause of the Shen Neng 1 running aground was most likely fatigue and the accident might have been avoided if pilots were mandatory for ships navigating through the Great Barrier Reef.

- (c) There is no allegation that the Shen Neng 1 was required to have a pilot in the area that it was navigating.
- (d) Australia cannot mandate the use of pilots within Australia's Exclusive Economic Zone beyond existing defined areas. The International Maritime Organization ("IMO"), a UN agency, is responsible for this. Australia sought but failed to persuade the IMO introduce laws for mandatory pilotage in this area in 2004.
- (e) The Queensland Government is responsible for overseeing the salvage operation. The Shen Neng 1 was moved to Hervey Bay pursuant to a decision of the Queensland Government because the waters in the area are calmer and this would facilitate the salvage operation.
- (f) The place that the Shen Neng 1 is currently located, in or around Hervey Bay, is within the coastal waters controlled by the Queensland Government.

Advice – potential claim against ship owner

- 5. There is no treaty or reciprocal arrangement in force between Australia and China on the service of processes in civil proceedings. This means that service of any claim would need to be effected through diplomatic channels, which is slow, expensive and uncertain.
- 6. Further, there is no treaty or reciprocal arrangement in place between China and Australia in relation to the recognition or enforcement of judgments in civil proceedings. Our research indicates that in practice enforcement of foreign judgments in China is ineffective.
- 7. This means that even if a claim was able to be served in China and the claim was ultimately successful against Shenzhen Energy, it would be unlikely to be able to be enforced in China and therefore the claimants would be unlikely to obtain compensation.

Advice – potential claim against Commonwealth Government

- 8. You have instructed us that your concern about the Commonwealth Government's conduct is that it did not require the Shen Neng 1 to have a pilot on board when it sailed through the Great Barrier Reef and, if it did, the accident that did occur might have been avoided.
- 9. We have assumed that the information that you have provided to us, that it is not within the power of the Commonwealth Government to mandate pilotage in the area that the accident occurred, is correct.
- 10. On this basis, even if it could be proven that the accident could have been avoided if a pilot had been onboard, it is most unlikely that a cause of action for breach of statutory duty or negligence would lie against the Commonwealth Government.
- 11. The waters where the Shen Neng 1 is currently located are not owned or occupied by the Commonwealth and therefore there would not be a basis for a claim in nuisance against the Commonwealth.

Advice – potential claim against Queensland Government

12. You have instructed us that your concern about the Queensland Government's conduct is that it decided to move the Shen Neng 1 to Hervey Bay, a pristine environment where many businesses and residents are dependent on tourism and fishing for income and would likely suffer property damage and economic loss as a consequence of any coal spill. You have instructed us that the Shen Neng 1 was moved from an area which is already equipped to deal with spills and whose income is derived from coal exports. You have also instructed us that the rationale for Queensland Government's decision was to move the ship to calmer waters to facilitate the salvage operation.
13. As a preliminary matter it is difficult to see how a decision to move a ship to what is presumably a safer location for a salvage operation to be conducted would be regarded as a breach of a statutory duty or a duty of care (if either were found to exist).
14. If there was a coal spill as a consequence of the decision of the Queensland Government to move the ship, residents and businesses suffering loss or damage as a consequence of the spill may have an action against the Queensland Government for breach of statutory duty or in negligence or nuisance. The prospects of succeeding would be influenced by the matters set out below.
15. The most significant factor in determining whether an action would lie in breach of statutory duty or negligence would be the cause of the spill and whether it was a consequence of an act or omission of the Queensland Government. It is not possible to take this analysis further in a hypothetical situation.
16. There are a range of further hurdles or complications that would need to be overcome to successfully sue the Queensland Government. These include:
 - (a) Section 35 of the *Civil Liability Act 2003* (Qld) specifies the principles that are to be taken into account in determining whether a public or other authority has a duty or has breached a duty. These principles relate to the finances and other resources of the authority, the range of functions that it must exercise and its compliance with general procedures and applicable standards. The likely effect of these principles is to make it more difficult to establish that an authority has a duty or has breached a duty in circumstances where it has followed general procedures and or relates to a decision about the allocation of limited resources.
 - (b) Section 36 of the *Civil Liability Act 2003* (Qld) provides that in proceedings based on a breach of statutory duty, an act or omission does not constitute a breach unless it was so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.
 - (c) In the context of an action in negligence, even if successful, it is more difficult to recover damages for pure economic loss (i.e. lost income) than it is to recover damages for property damage and economic loss suffered as a result of property damage. The distinction can be illustrated by the following example. If a whale watching business owned a boat and the boat was damaged by a coal spill and could not operate as a consequence and the

business could not earn income by taking people out for whale watching, then that would be economic loss arising from property damage. If, on the other hand, the boat was not damaged but the water was so dirty that the whale watching business lost its customers, then this would be pure economic loss. In seeking to establish a duty of care in negligence in a case of pure economic loss additional factors need to be considered, specifically the vulnerability of the plaintiff and the defendants' control and knowledge.

- (d) There are a range of defences that would need to be considered including:
- (i) the public immunity defence (that the State acted in accordance with legitimate policy considerations and/or performed quasi-legislative or legislative functions);
 - (ii) the statutory authority defence (that a statute has authorised the act/omission that caused the nuisance); and
 - (iii) the defence that the act causing a nuisance was an act of a third party.

It is beyond the scope of our instructions and this advice to analyse the possible application of these defences.

17. Finally, even if all of the above hurdles and complications could be overcome, the *Civil Liability Act 2003* (Qld) creates a proportionate liability regime that is applicable to claims for economic loss or property damage. The effect of this regime is to apportion claims among concurrent wrongdoers whose acts or omissions caused the loss or damage. The liability of concurrent wrongdoers is limited to an amount reflecting the extent of their responsibility for the loss or damage. The likely concurrent wrongdoer in any action against the Queensland Government would be Shenzhen Energy. This means that in any successful action against the Queensland Government, if a court found that Shenzhen Energy was, for example, 70% responsible for the loss or damage, the Queensland Government would only be required to pay compensation in respect of 30% of the loss. For the reasons outlined at the beginning of this advice, it is unlikely to be possible to recover losses from Shenzhen Energy. The applicability of these proportionate liability provisions will depend largely on the cause of any coal spill and, as we said in paragraph 15 above, it is not possible to take this analysis further in a hypothetical situation.

Advice - conclusion

18. It is likely to be very difficult for businesses and persons in Hervey Bay to seek compensation in the hypothetical event that they suffer loss or damage as a result of coal spillage from the Shen Neng 1 during the current salvage operation.
19. An action against the owner of the Shen Neng 1 is likely to be impractical.
20. There does not appear to be any cause of action against the Commonwealth Government.
21. In relation to the Queensland Government, there are many factors that would need to be analysed (at significant cost) and hurdles to be overcome. Further, at best, the Queensland Government would only be required to compensate loss or damage to the extent that it contributed to the loss or damage and that contribution would likely be reduced by reference to any contribution made by the owner of the Shen Neng 1.

Further hypothetical

22. You have also asked us to consider a hypothetical scenario in which the Shen Neng 1 grounding resulted in a serious environmental impact in the Great Barrier Reef causing loss and damage to residents and businesses operating nearby.
23. Our advice would not change in relation to an action against the owner of the ship – the same practical problems would exist.
24. Our advice would not change in relation to a claim against the Commonwealth Government, assuming that the concern about the Commonwealth's conduct in the hypothetical was its failure to mandate pilotage in the area. If the cause of the accident was different, or the Commonwealth Government failed to take other steps that it could have taken to prevent the grounding, then our advice may change.
25. There might be an action against the Commonwealth in nuisance in this further hypothetical situation if the Commonwealth could be properly regarded as the owner/occupier of the waters in which the environmental incident occurred and if the defences outlined at 16(d) above could be overcome. In order to determine whether there would be a viable claim in nuisance, complex legal analysis would need to be undertaken by reference to a detailed factual or hypothetical scenario.
26. The further hypothetical does not include an act or omission by the Queensland Government.

Yours faithfully



Rebecca Gilsenan
MAURICE BLACKBURN