Chapter 8

Ports and Harbours

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8.1 Introduction

Ports and harbours play an integral part in Australian trade and commerce, in the Australia national psyche, and are a critical component in the management and regulation of the coastal and marine environment. Unlike some other components of the marine environment, ports and harbours are very much at the interface between the terrestrial and the coastal and marine environment. From a terrestrial perspective, the infrastructure associated with ports and harbours not only often encompasses a narrow coastal fringe, but in some instances may dominate coastal towns and even cities with significant consequences for planning laws and regulations. The road and rail transport infrastructure required for major ports and harbours provides access and egress to and from ports and harbours so that the consequential environmental and development impacts are felt well beyond their limits. From a maritime perspective ports and harbours are not only commercial centres for national and international shipping, but also for fishing fleets and recreational craft. The activities of a port or harbour will have implications for the adjacent marine environment, whether as a result of the deepening and dredging of shipping channels, the impact of increased shipping transits, and the consequences of increased risk of maritime disasters especially oil spill.[1] Some Australian ports are very modest, such as that at Quintell Beach (Qld) which is a barge facility that services the Lockhart River community in far north Queensland,[2] while others such as Port Headland (WA),

1 This was illustrated by the 2010 *Shen Neng 1* spill on the Great Barrier Reef following passage of that vessel from the Port of Gladstone through the Great Barrier Reef Marine Park: Australian Transport Safety Bureau, Australian Government, *Independent investigation into the grounding of the Chinese registered bulk carrier Shen Neng 1 on Douglas Shoal, Queensland 3 April 2010* (ATSB Transport Safety Report, Marine Occurrence Investigation No 274, MO-2010-003, Final).

2 With a reported 2083 tonnes of cargo for the year 2009-2010: Ports Australia, *Total Throughput (Mass Tonnes) for 2009/2010* <www.portsaustralia.com.au/tradestats/?id=1&period=10>.

Dampier (WA), Newcastle (NSW) and Hay Point (Qld) are at the forefront of Australia's international export economy.[3] This chapter will address these issues from the perspective of coastal and marine law with a particular emphasis upon shipping operations, and port and harbour development. Consideration will also be given to the particular jurisdictional framework that exists in Australia with respect to ports and harbours, and the interaction of Commonwealth, State and Territorial, and local government law.

8.2 Legal Framework under the LOSC

The starting point for assessing the legal framework associated with ports and harbours is the law of the sea. The distinction between the law of the sea and maritime zones dealing with internal waters and the territorial sea is fundamental to appreciating the legal framework associated with ports and harbours because they are located at the interface of these two zones. Under the 1982 *United Nations Convention on the Law of the Sea* (LOSC),[4] coastal state sovereignty and jurisdiction over internal waters is not disturbed.[5] However, in the territorial sea while coastal state sovereignty and jurisdiction is parallel to that which exists over internal waters, multiple provisions of the law of the sea are applicable which effectively internationalise aspects of the management of those waters, especially for shipping, which do not apply in the case of internal waters.

When determining the boundary between internal waters and the territorial sea, the default position is that internal waters are on the landward side of the baselines from which the breadth of the territorial sea is measured.[6] This places an onus upon a coastal state to determine its straight baselines in accordance with the LOSC.[7] In the case of Australia's straight baselines, the waters of major ports and harbours such as Port Jackson (Sydney Harbour) and Port Philip Bay all fall on the landward side of the straight baselines and accordingly are conclusively within Australia's internal waters. Nevertheless, the drawing of straight baselines has not been without controversy in Australia. In some instances the Australian interpretation of the law

3 Respectively with 2009-2010 reported cargo of 178 million tonnes, 170 million tonnes, 103 million tonnes and 99 million tonnes: Ports Australia, *Total Throughput (Mass Tonnes) for 2009/2010* <www.portsaustralia.com.au/tradestats/?id=1&period=10>.

4 Opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (LOSC).

5 The only exception to this is provided for in LOSC article 8(2) in cases where the drawing of straight baselines has the effect of enclosing as internal waters areas which had previously been considered to be a part of the territorial sea within which the right of innocent passage was exercised; there is no known example of such waters around the Australian coast.

6 LOSC article 8.

7 Ibid, article 7.

of the sea has been challenged by the United States, which has protested Australia's assertion of historic bay status to certain bays along the coast of South Australia.[8] In other instances the distinction between internal waters, and coastal waters of the State (both pre and post-Federation) has been at issue as was the case in *Raptis v South Australia*,[9] where the High Court was called upon to consider the status of Spencer Gulf and the Gulf of St Vincent and whether there were distinctions between a "bay" and a "gulf" for the purposes of Australian law.[10]

8.2.1 *Jetties and Roadsteads*

In cases where a port or harbour does not clearly lie on the landward side of straight baselines, but may have been built along the coastal front with accompanying infrastructure such as jetties, roadsteads and wharves,[11] the question of how the baselines are determined and whether these structures are within the territorial sea may prove to be legally significant. Here the LOSC makes some specific concessions with respect to ports, and in article 11 provides that:

> For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.

Accordingly, a jetty, pier or wharf is effectively substituted for the coast for the purposes of determining the basepoint of the territorial sea. On the other hand an offshore breakwater or offshore refuelling facility, albeit within the proclaimed limits of the port or harbour under State law, would not be a legitimate basepoint from which the territorial sea can be delimited. This approach is reflected in the LOSC position with respect to roadsteads, where article 12 provides that:

> Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or

8 J Ashley Roach and Robert W Smith, *United States Responses to Excessive Maritime Claims* (Martinus Nijhoff, 2nd ed, 1996) 35-38 relating to the Australian claims with respect to historic bay status for Anxious, Encounter, Lacepede and Rivoli Bays in South Australia; see the extensive discussion in WR Edeson, "Australian Bays" [1968-1969] *Australian Year Book of International Law* 5.

9 *Raptis and Son v South Australia* (1977) 138 CLR 346.

10 Ibid 360-361 where Gibbs J referred to the dictionary definition in order to distinguish between a bay and gulf, noting that: "Both are indentations of the sea into the land. "The distinction between *gulf* and *bay* is not always clearly marked, but in general a bay is wider in proportion to its amount of recession than a gulf"; see also 384 (Mason J).

11 Australian examples would include the ports of Hay Point, Port Kembla, Portland, Quintell Beach and Townsville.

partly outside the limit of the territorial sea, are included in the territorial sea.

The Karumba Roadstead off the port of Karumba (Qld) was proclaimed in 2000 as a roadstead for the purposes of the LOSC and under the *Seas and Submerged Lands Act 1973* (Cth).[12] Accordingly, the outer limit of the territorial sea in that part of the Gulf of Carpentaria is extended to include the roadstead and the coordinates have been listed on a chart published by the Australian Maritime Safety Authority (AMSA).[13]

A distinction needs to be made between the manner in which the law treats ports and harbours and associated works, such as marinas and canals associated with residential developments. A marina which provides berthing facilities to fishing and pleasure craft may be located within a designated port or harbour and as such may either be located within the territorial sea, or in internal waters. Often, to ensure protection for these vessels, a marina may fall within designated harbour works and as such the provisions of article 11 of the LOSC would have application. Where a marina is clearly located on the landward side of the baselines, such as within a river, estuary, or a bay, then the marina would fall within internal waters.[14] Canals which have been built in support of residential developments in Australia, especially in Queensland, would also fall into the category of internal waters and not be subject to the provisions of the law of the sea.[15] Likewise, waterways and their management are not matters that fall within the ambit of the law of the sea as these bodies of water are only found on the landward side of the baseline.[16]

Distinctive offshore works such as roadsteads associated with a port or harbour, are as noted above directly addressed under the LOSC. Any other form of offshore works, such as artificial installations and platforms associated with oil and gas exploration and development, fall into a separate category and are not regulated under the regime dealing with ports and harbours.[17] Navigational aids such as lighthouses, beacons and buoys are

12 Proclamation, *Seas and Submerged Lands Act 1973* (Cth), 29 August 2010; see Australian Maritime Safety Authority, Australian Government, *Karumba Roadstead* <www.amsa.gov.au/shipping_safety/Navigation_Safety/Notices/Karumba_Roadsted>.

13 This is consistent with LOSC article 16; see the Australian Maritime Safety Authority, Australian Government, *Chartlet of Karumba Roadstead* <www.amsa.gov.au/shipping_safety/Navigation_Safety/Notices/Karumba_Roadsted/chartlet_of_Karumba_Homestead.asp>.

14 This is the case with the Gladstone Marina, which falls within the limits of the Port of Gladstone on the landward side of the baselines.

15 Ocean going canals such as the Panama Canal and Suez Canal enjoy a distinctive international legal regime.

16 See eg *Water Act 1989* (Vic) s 3 definition of a waterway to include a "river, creek, stream or watercourse".

17 See LOSC articles 60 and 80; and the discussion in Chapter 7.

all capable of being built and maintained to support shipping and navigation associated with a port or harbour, however these installations have no implication for the delimitation of the territorial sea other than when they have been built upon low-tide elevations that fall within the territorial sea.[18]

8.3 Coastal and Marine Law Operations

Ports and harbours in Australian law may fall within multi-jurisdictional frameworks either because of their location, and the application of relevant Commonwealth, State, Territorial, and local government law. Originally, Australian law predominantly distinguished between naval ports,[19] and all other ports, which fell within the territorial limits of a State and were therefore predominantly under a State legal regime. Much of that State law as it related to ports and harbours either dealt with navigation,[20] or matters associated with port works and their regulation,[21] and labour within the port.[22] Little consideration was given to environmental issues associated with a port or harbour. Following self-government for the Northern Territory, there also emerged distinctive law governing the port of Darwin.[23]

However, with the development of a greater range of specific Commonwealth, State and Territorial environment laws regulating the coastal and marine environment, aspects of port and harbour operations have increasingly come within the ambit of an expanding array of new statutory regimes. In some instances, this has arisen because a development has fallen within the boundaries of a designated national park, as occurred in the case of the dredging of the Hinchinbrook Channel between Hinchinbrook Island and the Queensland coast in order to facilitate a marina development. In that instance, because of the proximity of the World Heritage listed Great Reef Marine Park, the court was asked to consider the application of the *World Heritage Properties Conservation Act 1983* (Cth).[24] Following the enactment of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), there is also the potential for Commonwealth environmental law to be

18 LOSC articles 7 and 13.

19 See *Control of Naval Waters Act 1918* (Cth).

20 See eg *Navigation Act 1901* (NSW); *Passengers Harbours and Navigation Act 1889* (Vic).

21 See eg *Maritime Services Act 1935* (NSW); *Marine Administration Act 1989* (NSW); *Harbours Act 1955* (Qld); *Harbours Act 1936* (SA); *Marine Act 1976* (Tas); *Port of Melbourne Authority Act 1958* (Vic); *Freemantle Port Authority Act 1902* (WA); *Darwin Port Authority Act 1583* (NT).

22 See eg *Ports and Maritime Administration Act 1995* (NSW).

23 *Darwin Port Corporation Act 1983* (N1).

24 *Friends of Hinchinbrook Society v Minister for the Environment (No 3)* (1997) 77 FCR 153; the Act has subsequently been repealed and replaced with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

applied in a port or harbour where an activity may have a significant environmental impact upon a matter of national environmental significance,[25] such as wetlands listed under the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar wetlands),[26] threatened species,[27] listed migratory species,[28] or the environment of Commonwealth land.[29] As port and harbour developments may often be co-located adjacent to such areas, there is a strong possibility that the *Environment Protection and Biodiversity Conservation Act* may be triggered in relation to significant development activities within existing ports and harbours or associated with the development of a new facility.[30]

Besides the application of Commonwealth law, and the special exceptions that arise in the case of naval ports and their facilities,[31] State or Territorial law will predominantly apply within ports and harbours with respect to port and harbour development. The limits of a port and harbour, which will encompass coastal land areas where port infrastructure is predominantly located and adjoining maritime areas within which the control, management and safety of shipping movements are regulated,[32] will also be governed by State or Territorial law. Likewise, State and Territorial coastal and marine law will also predominantly apply, as the limits of the port or harbour will also inevitably include the coastal waters of the State or Territory, including portions of the adjoining territorial sea. This may also arise as a result of the proximity to a marine park triggering the application of relevant marine park laws and regulations,[33] which may permit for judicial review.[34] Or, it may arise purely through the application of State or Territorial environmental

25 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(a).

26 Opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 16-17B. For example, the Towra Point Nature Reserve on the southeastern shore of Botany Bay (NSW) is a listed Ramsar site within the confines of Botany Bay which is co-located with Port Botany, a large container port servicing Sydney.

27 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 18-18A.

28 Ibid, ss 20-20A.

29 Ibid, ss 26-27A.

30 See *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463.

31 See *Control of Naval Waters Act 1918* (Cth).

32 See *Transport Infrastructure Act 1994* (Qld) s 274 allowing regulations to be made that "define or amend the limits of a port". These measures are also relevant for the purposes of seeking to impose pilotage requirements upon shipping movements within a port.

33 See *Alliance to Save Hinchinbrook v Chief Executive, Environmental Protection Agency* [2007] 1 Qd R 102; where the *Marine Parks Act 1982* (Qld) applied.

34 See *North Queensland Conservation Council v Executive Director, Queensland Parks and Wildlife Service* (2000) 5 QAR 196 discussing the application of the *Judicial Review Act 1991* (Qld).

law,[35] including law specifically directed towards marine pollution arising as a result of shipping.[36]

8.4 Jurisdictional Framework

With the exception of some of the particular issues that have arisen with respect to Commonwealth waters, historically it has been the States that have exercised jurisdiction, control and management over ports and harbours. This was very much the position during the post-Federation century and it remains the position in the 21st century. Nevertheless, while ports and harbours predominantly fall within the limits of a State or Territory, and accordingly are principally subject to State or Territorial law, the broad extent of Commonwealth powers with respect to navigation and shipping, and increasingly with respect to the environment, means that Commonwealth law also applies. Therefore, as with the majority of coastal and marine law in Australia, the jurisdictional framework for the regulation and management of marine and coastal issues associated with ports and harbours is complex and has been subject to evolution over time.

8.4.1 *Commonwealth*

The *Seas and Submerged Lands Act* outlines the framework for the application of Commonwealth law to offshore areas, and sets the parameters for the application of relevant State and Territorial law under the subsequent Offshore Constitutional Settlement (OCS). Notwithstanding the extensive assertion of offshore title and control by the Commonwealth, the Act included some savings provisions. In particular, s 14 provides:

> Nothing in this part affects sovereignty or sovereign rights in respect of any waters of the sea that are waters of or within any bay, gulf, estuary, river, creek, inlet, port or harbour and:
>
> (a) were, on 1st January 1901, within the limits of a State; and
>
> (b) remain within the limits of the State;
>
> or in respect of the airspace over, or in respect of the sea-bed or subsoil beneath, any such waters.

When considering the 1975 challenge to the constitutional legitimacy of the Acts, the High Court in *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)*[37] had occasion to reflect upon the role of s 14. In noting that the territory of a State extends to the low-water mark, Gibbs J considered the consequences arising from a proclamation by the Governor-General of

35 See eg *Sustainable Planning Act* 2009 (Qld).

36 See *Pollution of Waters by Oil and Noxious Substances Act 1987* (Tas).

37 *New South Wales v Commonwealth* (1975) 135 CLR 337.

straight baselines which would have the effect of enclosing certain waters.[38] In these instances, Gibbs J noted that:

> Section 14 would preserve the sovereignty of the States in respect of areas "within any bay, gulf, estuary, river, creek, inlet, port or harbour" but would not preserve State rights in respect of the shore between low- and high-water mark.[39]

Mason J was more direct in his views as to the import of the provision, noting:

> The saving provisions of s 14 are designed to preserve State rights over internal waters within the territory of a State, as for example, waters of the sea within a bay which is on the landward side of the baselines of the territorial sea.[40]

The importance of this observation, however, needs to be seen against s 10 of the *Seas and Submerged Lands Act* which directly referred to the sovereignty of the Commonwealth over the internal waters of Australia, being those waters on the landward side of the straight baselines from which the territorial sea had been proclaimed. The savings provision of s 14 was of particular importance in relation to s 10, which as Mason J noted, was therefore a provision which "did not operate so as to attempt to vest in the Commonwealth sovereignty over waters within the territory of a State".[41]

The intent of s 14 of the *Seas and Submerged Lands Act*, and the subsequent High Court commentary highlight two matters. The first is the importance of attempting to define the limits of a State and whether certain waters are considered to fall within the limits of a State. This involves an analysis of colonial boundaries, the considered limits of the States at the time of Federation, and the common law. The second is the importance of distinguishing between waters of a State recognised as such at the time of Federation, and the internal waters adjacent to a State arising as a consequence of the declaration of straight baselines around parts of the coastline consistent with Australia's entitlements under international law.[42] Care, however, must be exercised in undertaking this analysis as "internal waters" is a law of the sea concept which only gained support throughout the 20th century as a result of developments in the relevant conventional law,

38 Ibid, 414-415 (Gibbs J).

39 Ibid, 415 per Gibbs J who noted that any claim by the Commonwealth to sovereignty over the area between the low-water and high-water mark would be invalid.

40 Ibid, 476 (Mason J).

41 Ibid.

42 The international law with respect to straight baselines has developed considerably during the past 50 years, and Australia has sought to take advantage of this, especially since the conclusion of the LOSC and baselines have been proclaimed under the *Seas and Submerged Lands Act 1973*: Attorney-General's Department, Australian Government, *Australia's Territorial Sea Baseline* (Australian Government Publishing Service, 1988).

especially following recognition of the capacity of coastal states to proclaim straight baselines. Whilst there are numerous examples of internal waters now to be found around the Australian coastline following the proclamation of straight baselines consistent with international law, no such baselines were in place at the time of Federation in 1901.[45]

8.4.2 *States*

In light of the constitutional jurisdictional framework reflected in the *Seas and Submerged Lands Act* and the subsequent OCS arrangements, two predominant jurisdictional sets of arrangements will exist with respect to State ports and harbours. First, are those facilities located on the landward side of the baseline falling within the limits of the State. Examples would be Port Jackson, the Port of Botany, and Port Melbourne. In these cases, these ports and harbours are predominantly subject to the application of State law, and Commonwealth law would only apply where there is a relevant Commonwealth environmental interest which may trigger the *Environment Protection and Biodiversity Conservation Act*[44] or to ships that are subject to the *Navigation Act 1912* (Cth).[46] Second, are those ports and harbours which encompass a mixed area that may be on either side of the baselines including waterways on the landward side of the baselines and associated port facilities and infrastructure adjoining the coast. Examples here would include Port Kembla and the Port of Portland. These ports fall within a mixed jurisdictional zone which is partly subject to the *Seas and Submerged Lands Act*, and its confirmation that certain State waters within the limits of the State at Federation were not impacted upon by the Act,[47] and the *Coastal Waters (State Title) Act 1980* (Cth), which confer rights, title and property over the seabed and superjacent waters of the territorial sea to the States.[47] Through this confirmation of the retention of State legislative power over the waters of rivers, creek, estuaries and inlets that may be associated with ports and harbours, and the conferral of power under the OCS to a territorial sea of 3 nm,[48] State legislative power is more than adequate for the purposes of exercising jurisdiction and control over port and harbour activities along

43 The significance of this distinction is further discussed in Donald R Rothwell and Brad Jessup, "The Limits of the Great Barrier Reef Marine Park: Defining Bays and Redefining Regulatory Control" (2009) 37 *Federal Law Review* 71.

44 As occurred in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463; see the discussion below.

45 See the discussion regarding the application of the *Navigation Act 1912* (Cth) to shipping in Chapter 9.

46 The Port of Brisbane would be an example.

47 *Coastal Waters (State Title) Act 1980* (Cth) s 4.

48 *Coastal Waters (State Power) Act 1980* (Cth) s 5.

their coastlines, subject always in the case of Queensland to the ongoing application of the *Great Barrier Reef Marine Park Act 1975* (Cth).[49]

All of the States have extensive legislative frameworks with respect to ports dealing with the administration and management of existing ports, the development of new ports, and associated matters such as harbour works and infrastructure.[50] The current legislative frameworks, all adopted in the 1990s, represent a considerable updating and consolidation of the legislative frameworks which had existed up to that time, and which in some cases vested considerable powers in port authorities responsible for the management of individual ports.[51] In recent decades, ports and harbours throughout Australia have gone through various phases of public and private ownership with regulation by statutory authorities and private corporations. Some of these processes have been politically and legally contentious, and the courts have been called upon in some instances to resolve some of these disputes.[52]

In some instances a consolidated approach has been taken to the legislative framework regulating ports. In Queensland, the *Transport Infrastructure Act 1994* (Qld) is an omnibus statute dealing with statewide transport infrastructure, including ports. The Act regulates port facilities, which may include wharves and port operational areas, including shipping channels, marine and port structures, and offshore structures used for shipping purposes.[53] In Victoria, the *Port Management Act 1995* (Vic) provides a specific regulatory framework for the ports of Melbourne, Geelong, Portland and Hastings, and all other declared ports within the State.[54] A distinction is made between these large commercial ports and smaller "local ports" under the control of port managers.[55]

Subject to the size of port or harbour and its regulatory regime, a port or harbour will have a designated "harbour master". Generally the harbour master will be the person appointed under law, to whom a range of

49 *Coastal Waters (State Title) Act 1980* (Cth) s 4(3); this is an exception which does not apply elsewhere to any other State.

50 See eg *Ports and Maritime Administration Act 1995* (NSW); *Transport Infrastructure Act 1994* (Qld); *Harbors and Navigation Act 1993* (SA); *Port Companies Act 1997* (Tas); *Port Management Act 1995* (Vic); *Port Authorities Act 1999* (WA); *Darwin Port Corporation Act* (NT).

51 See eg *Port of Brisbane Authority Act 1976* (Qld); *Port of Geelong Authority Act 1958* (Vic); *Port of Melbourne Authority Act 1958* (Vic); *Albany Port Authority Act 1926* (WA); *Fremantle Port Authority Act 1902* (WA).

52 See eg *Port of Portland Pty Ltd v Victoria* (2010) 85 ALJR 182.

53 *Transport Infrastructure Act 1994* (Qld) s 267A.

54 *Port Management Act 1995* (Vic) s 3.

55 This includes the designated local ports along the Gippsland coast of Mallacoota, Snowy River (Marlo), Gippsland Lakes, Corner Inlet and Port Albert, and Anderson Inlet (Inverloch) which are jointly administered by the Gippsland Ports' Committee of Management; see <www.gippslandports.vic.gov.au>.

responsibilities and powers are conferred under State law.[56] They may also be subject to direction by a minister.[57] Those powers principally relate to the navigation and safety of all vessels within the limits of the harbour, and will extend to matters relating to pilotage, the closing and reopening of a port or harbour, and the giving of directions to dangerous vessels not to leave, enter or move within a port or harbour.[58] The harbour master is a key figure in coordinating responses to any maritime incident that occurs within the port and harbour, including cooperating with relevant State and Commonwealth authorities. During and after the January 2011 Brisbane floods, the Regional Harbour Master (Brisbane) was not only responsible for managing the safety of shipping in the Port of Brisbane, but also coordinating with Maritime Safety Queensland, the Port of Brisbane Pty Ltd, and the Australian Defence Force in clean up and recovery operations.[59]

8.4.3 *Territories*

In the case of the Territories, slightly different arrangements are in place as Commonwealth sovereignty over internal waters is retained under the *Seas and Submerged Lands Act*;[60] the s 14 exception only applying to waters within the limits of a State at Federation. Nevertheless, specific arrangements were made for the Northern Territory under the OCS with the effect that title to the seabed and water column over a 3 nm territorial sea is also vested.[61] Accordingly, the *Darwin Port Corporation Act* (NT) regulates the Port of Darwin consistent with this power. In the case of the only other internal Territory with a port or harbour, the Jervis Bay Territory on the southern coast of New South Wales falls within Commonwealth jurisdiction. No exception has been made for the Australian Capital Territory in relation to territorial sea adjacent to the Jervis Bay Territory, or with respect to the internal waters of Jervis Bay, which is divided between New South Wales and the Jervis Bay Territory.[62]

56 See eg *Marine Safety Act 1998* (NSW) ss 4, 87.

57 Ibid, s 87.

58 See generally *Marine Safety Act 1998* (NSW); *Transport Operations (Marine Safety) Act 1994* (Qld).

59 See Maritime Safety Queensland, Queensland Government, *Queensland Notice to Mariners, No 56 (Temporary) of 2011: Brisbane pilotage area* (20 January 2011) <www.msq.qld.gov.au/~/media/8967b394-353b-49be-bcc3-7aa1061d7c9d/ntm2011jan056063.pdf>; and Maritime Safety Queensland, Queensland Government, *Response to the Recent Brisbane Floods* (24 February 2011) <www.msq.qld.gov.au/About-us/MSQ-headlines/Brisbane-floods-response.aspx>.

60 *Seas and Submerged Lands Act 1973* (Cth) s 10.

61 See *Coastal Waters (Northern Territory Powers) Act 1980* (Cth); *Coastal Waters (Northern Territory Title) Act 1980* (Cth).

62 The naval port of Jervis Bay associated with the Royal Australian Naval College falls within the ambit of the *Control of Naval Waters Act 1918* (Cth).

8.4.4 *Naval Waters*

Direct Commonwealth control with respect to ports and harbours occurs with respect to all naval ports, or those used for defence purposes. Here, through a combination of the Commonwealth's extensive powers with respect to defence,[63] external territories,[64] and the offshore through the *Seas and Submerged Lands Act*, the Commonwealth has extensive powers over certain ports and harbours. The *Control of Naval Waters Act 1918* (Cth) allows for the proclamation of naval waters in the vicinity of a naval establishment or defence land, over which the Commonwealth can then exercise wide-ranging controls. The *Defence Act 1903* (Cth) also confers extensive powers upon the Commonwealth to regulate activities taking place on defence land, which includes all naval ports and associated facilities. Notwithstanding the broad sweep of Commonwealth law applying to defence facilities, naval establishments located within States may still be impacted by the operation of some State planning and environmental laws.[65] External territories with their own port facilities also fall within the ambit of Commonwealth legislative control. This includes the port facilities of the Indian Ocean territories at Christmas Island (Flying Fish Cove), and Home Island in the Cocos (Keeling) Islands, with are regulated by Commonwealth legislation and applied Western Australia legislation.[66]

8.4.5 *Local Government*

Local governments around Australia may also have some specific responsibilities for ports and harbours under their delegated legislative powers. These powers will extend to matters within the ambit of local government, such as the provision of garbage and refuse facilities, but may also extend to management of swimming and other recreational activities, and also matters associated with development applications and local planning. In New South Wales, the *Local Government Act 1993* (NSW) confers upon local council authorities certain powers with respect to tidal waters, which include "the waters of the sea or of any lake, estuary, harbour, river, bay or lagoon in which the tide ebbs and flows".[67] In some cases, these powers are

63 The Constitution, s 51(vi).

64 Ibid, s 122.

65 See *Sydney Local Environmental Plan 2005* (NSW) reg 42, and *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (NSW), which refer to the Garden Island naval dockyard, and *HMAS Platypus* which are both located within the limits of Sydney Harbour (Port Jackson).

66 See *Christmas Island Act 1958* (Cth) s 8A; *Cocos (Keeling) Islands Act 1955* (Cth) s 8A; and discussion in Michael White, *Australian Offshore Laws* (Federation Press, 2009) 311.

67 *Local Government Act 1993* (NSW) s 3.

extensive enough to extend to the construction of harbours for small vessels within tidal waters.[68] The power may also extend to the provision of ferry services within a port or harbour.[69] In Queensland, where canal and marina developments have especially been popular along parts of the Gold Coast and Sunshine Coast, distinctive legislation has been enacted to regulate the management and control of tidal waters associated with such developments, especially with respect to marinas, and the role of both local governments and the relevant body corporate.[70]

8.4.6 *Interaction of Commonwealth and State Jurisdiction*

Jurisdictional interaction between the Commonwealth and the States is a common feature of Australian coastal and marine law which also has implications for the management of ports and harbours, especially in Queensland where the operation of the *Great Barrier Reef Marine Park Act 1975* (Cth) needs to be taken into account.[71] The Act confines the boundaries of the Marine Park to within the "Great Barrier Reef Region" as follows:

> There shall be a marine park, to be known as the Great Barrier Reef Marine Park, consisting of such areas in the Great Barrier Reef Region as are, for the time being, declared under section 31 to be parts of that Marine Park.[72]

The "Great Barrier Reef Region" means, according to s 3 of the Act, an area that is principally described in Schedule 1 to that Act. That area, which is identified by geographical coordinates extending due east from the low-water mark of parts of the Queensland coast, comprises significant portions of Australia's maritime domain offshore Queensland running south from a point east of Cape York to just north of Fraser Island at distances of 100-300 kilometres from the coast.[73] This area offshore the Queensland coast unquestionably includes Magnetic Island,[74] which is an island within the limits of the State of Queensland. This then raises issues as to whether any port or harbour development which may take place on Magnetic Island would be subject to the Act, or fall within the purview of Queensland State legislation.

68 See *Local Government Act 1993* (Qld) s 934; *City of Brisbane (Operations) Regulations 2010* (Qld) reg 37; *Local Government (Operations) Regulations 2010* (Qld) reg 23.

69 *Local Government Act 2009* (Qld) s 80B.

70 See *Sanctuary Cove Resort Act 1985* (Qld); see also the *Integrated Resort Development Act 1987* (Qld).

71 There are 12 ports along the Queensland coast from Quintell Beach to Gladstone which adjoins the Great Barrier Reef Marine Park.

72 *Great Barrier Reef Marine Park Act 1975* (Cth) s 30.

73 For further details see Great Barrier Reef Marine Park Authority, Australian Government, *Great Barrier Reef Marine Park Zoning Plan 2003* (May 2004) <www.gbrmpa.gov.au/__data/assets/pdf_file/0016/10591/Zoning_Plan.pdf>.

74 *Connolly and Great Barrier Reef Marine Park Authority and Far North Queensland Airwork Pty Ltd (party joined)* [2007] AATA 2098, [10].

The *Great Barrier Reef Marine Park Act*, s 3, however exempts from the "Great Barrier Reef Region":

> any part of such an area that is referred to in section 14 of the Seas and Submerged Lands Act 1973 or is an island, or a part of an island, that forms part of Queensland and is not owned by the Commonwealth.

While prima facie this would seem to suggest that Magnetic Island is exempted from the operation of the Act, it remains unclear as to what the position is with respect to waters and seabed adjacent to an island which may be the subject of a port or harbour development.[75] These issues were highlighted in *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service*[76] where an application for judicial review was made in relation to the development of a harbour and associated works at Nelly Bay on Magnetic Island where issues arose as to the interaction of the *Great Barrier Reef Marine Park Act* and the *Marine Parks Act 1982* (Qld).[77]

8.5 Shipping Operations

8.5.1 *Pilotage*

An important aspect of shipping operations for many Australian ports is pilotage, and in most instances there are separate legislative regimes to deal with the provision of pilots, their qualifications, and the rates and fees that may be imposed as a result of the provision of pilotage services.[78] Pilots are organised either at a State or Territorial level, or an individual port to port basis. Not all ports, however, require a pilot. In some instances a master may have a pilotage qualification. In other instances, a port may not be a declared "pilotage port" and so is exempt from a pilotage requirement.[79] Pilotage services may be provided directly by a port authority,[80] or by a separate pilotage authority. The effect of some of these provisions is that the master of a vessel must not enter or leave a port, or attempt to enter or

75 This issue was considered in ibid; and is discussed in Rothwell and Jessup, above n 43.

76 *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* (2000) 5 QAR 196.

77 See also the discussion in *Re Wulgurukaba Aboriginal Corporation v Nelly Bay Harbour Pty Ltd, Curtin Brothers Pty Ltd and Department of State Development* [2001] QLRT 98 where an interim injunction was sought under the *Land and Resources Tribunal Act 1993* (Qld) to stop earthworks associated with a harbour development following the discovery of certain skeletal remains.

78 See eg *Marine Pilotage Licensing Act 1971* (NSW); *Transport Operations (Marine Safety) Act 1994* (Qld); *Harbors and Navigation Act 1993* (SA); *Marine and Safety Authority Act 1997* (Tas); *Marine Act 1988* (Vic); *Shipping and Pilotage Act 1967* (WA); *Marine Act* (NT).

79 See eg *Ports and Maritime Administration Act 1995* (NSW) s 80.

80 As is the case in the Port of Darwin: *Darwin Port Corporation Act* (NT) s 16.

leave a port, or navigate a vessel within a port, without the use of a pilot.[81] Exemptions will apply in the case of a port where a pilot is not required to be engaged, where there is no licensed pilot, or in the case of a pilot-exempt master.[82] However, pilotage provisions only apply to certain craft and there are exemptions based on length, size and type of vessel.[83] An important issue which arose following the 2010 *Shen Neng 1* grounding on the Great Barrier Reef was the extent to which the pilot was required to remain on board the vessel after it had departed the Port of Gladstone. However, as the southern portions of the Great Barrier Reef were not within a compulsory pilotage zone,[84] once the limits of the port had been reached the pilot was able to disembark and so no legal issue arose with respect to the pilotage services that had been provided by the port.

8.5.2 *Vessel Traffic Services*

Closely linked with the benefits associated with pilotage and navigational safety is the provision of vessel traffic systems (VTS) which are shore-based shipping management systems which provide information to shipping on matters such as meteorological warnings and traffic management. VTS may be established consistent with the *International Convention for the Safety of Life at Sea*,[85] subject to IMO endorsement,[86] as it can be seen as an interference with the right of innocent passage that foreign ships enjoy within the territorial sea.[87] VTS can be applied within the confines of a busy port so as to ensure the safety of navigation, and may complement a pilotage area that operates within and adjacent to a port. The Port of Sydney maintains a VTS, which reflects the particularly busy nature of the harbour which is used by many different types of vessels. A VTS is also deployed within parts of the Great Barrier Reef, known as REEFVTS which encompasses the Torres Strait area and Great Barrier Reef. REEFVTS has a mandatory reporting system known as REEFREP which has been endorsed by IMO Resolution.[88] REEFVTS effectively provides a VTS system for those Queensland ports

81 *Marine Act 1988* (Vic) s 96.
82 Ibid, s 96(2).
83 Ibid, s 96(2)(d) exempts vessels less than 35 metres in length.
84 For discussion of Great Barrier Reef pilotage see White, above n 66, 367-368.
85 Opened for signature 1 November 1974, 1184 UNTS 278 (entry into force 25 May 1980) (SOLAS).
86 See SOLAS, Chapter 5 "Safety of Navigation".
87 See LOSC article 24; cf article 21(1)(a) allowing the coastal state to adopt laws and regulations that apply within the territorial sea providing for the "safety of navigation and the regulation of maritime traffic".
88 Australian Maritime Safety Authority, Australian Government, *REEFVTS – Great Barrier Reef and Torres Strait Vessel Traffic Service (VTS)* <www.amsa.gov.au/shipping_safety/REEFVTS/>.

which are immediately adjacent to its area of operation. The 2010 *Shen Neng 1* grounding on Douglas Shoal in the vicinity of the Port of Gladstone highlighted the need for the further southward extension of the REEFVTS, and as a result Australia requested and obtained IMO endorsement to extend the southern limits of the REEFREP system to encompass those waters which entered into force from 1 July 2011.[89]

8.5.3 *Marine Pollution*

A significant issue for all Australian ports and harbours is the regulation and management of marine pollution, especially ship-sourced but also land-based. Ports and harbours within State and Territorial jurisdictions are subject to the same marine pollution laws and regulations which generally apply within the coastal waters of the States and Territories.[90] Therefore notwithstanding that the port or harbour may be located on the landward side of the territorial sea baselines or along the outer edge of those baselines and directly fronting the territorial sea, it will be subject to the relevant State or Territory marine pollution regime.

Distinctive legal regimes dealing with land-based or other non-marine sourced pollution to ports and harbours can also be found. In the case of the Port of Darwin, the *Darwin Port Corporation Act* provides for an offence of causing damage to the port if an "undesirable substance"[91] is put into the port or is allowed to "fall or flow into" the port.[92] This would extend to the act of dumping, and also permitting the escape of certain substances into the port. The Port Corporation may take certain steps for the recovery of costs and expenses associated with the removal of undesirable substances.[93] Equivalent provisions exist under the *Harbors and Navigation Act 1993* (SA),[94] which allow for the making of regulations to deal with restricting and regulating the discharge of pollutants into the waters within a port or harbour.

In Victoria, the *Marine Act 1988* (Vic) creates distinctive provisions dealing with the regulation of prohibited discharges into State waters. Such discharges extend to oil, oily substances, and undesirable substances, which

89 See Hon Anthony Albanese, Minister for Infrastructure and Transport, "Greater Protections on the Way for the Great Barrier Reef" (Media Release, 8 December 2010) <www.ministers.infrastructure.gov.au/aa/releases/2010/December/AA489_2010.htm>.
90 See discussion in Chapter 10.
91 *Darwin Port Corporation Act* (NT) s 5 defines "undesirable substance" to include rubbish, gravel, earth, stone or wreck, flammable, corrosive or offensive substances, or an article or thing which may pose a hazard to navigation, oil, and any noxious or hazardous substance.
92 Ibid, s 34.
93 Ibid, s 36.
94 *Harbors and Navigation Act 1993* (SA) s 91.

may extend to ballast, rubbish, gravel, earth, stone or wreck, or dangerous, flammable, corrosive or offensive substances.[95] Port authorities are given power to deal with prohibited discharges,[96] seek to recover costs associated with clean up,[97] and to prosecute for offences.[98] An important aspect of the legislative regime in Victoria is the powers vested with the minister to be able to deal with vessels in a port or harbour from which a prohibited discharge is occurring.[99] This extends to the power to remove the vessel from the port or harbour, or to remove substances from a vessel that may be the subject of a discharge such as oil and other liquid substances.[100] These powers of intervention on the part of the minister are extensive and are clearly designed to protect the coastal and marine environment. Traditional exemptions apply however in the case of naval vessels and those which enjoy foreign state immunity.[101]

The waters of a port or harbour will also be subject to general marine pollution legislation adopted at the State or Territory level which has a specific focus upon ships and generally seeks to give effect to Australia's obligations under the *International Convention for the Prevention of Pollution of Pollution from Ships* (MARPOL).[102] General marine pollution legislation of that type has an application to the coastal waters of a State or Territory, and will accordingly be expansive enough to also include the waters of a port or harbour, and in some instances waters of creeks and lagoons subject to the ebb and flow of the tide which are within the general vicinity.[103] In the case of the *Transport Operations (Marine Pollution) Act 1995* (Qld) provision is also made for a discharge of a pollutant which occurs outside of coastal waters but which then enters coastal waters.[104] For the MARPOL regime to operate effectively there is a need for many, though not all, ports and harbours to maintain reception facilities which allow for the transfer of sewerage, wastes and other disposable liquids and solids from a ship. Operators of a port or terminal may therefore be directed to provide such facilities to ships that

95 *Marine Act 1988* (Vic) s 34
96 Ibid, s 38.
97 Ibid, s 38A.
98 Ibid, s 48.
99 Ibid, s 45.
100 Ibid, s 45(1).
101 Ibid, s 4.
102 Opened for signature 2 November 1973, (1973) 12 ILM 1319 (never entered into force); *Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships 1973*, opened for signature 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983) (entry into force for Australia 14 January 1988) (MARPOL). See the more extensive discussion of MARPOL in Chapter 10.
103 See *Transport Operations (Marine Pollution) Act 1995* (Qld) Schedule definition of "coastal waters".
104 Ibid, s 9.

are berthed, docked or undergoing repair, and penalties will arise from the failure to provide or maintain such facilities.[105] A ship's owner and its master may be under obligations to monitor the transfer of pollutants from the ship to a reception facility while within a port or harbour.[106]

One particular issue which arises in dealing with marine pollution for ports and harbours is oil spill response. AMSA coordinates the National Marine Oil Spill Contingency Plan which was released in its current form in January 2010.[107] Whilst the plan has a national focus extending to all of Australia's marine areas, it also has application at a State, Territory and local port level and is complemented by other governmental and industry contingency plans at the State and Territory, regional, port and individual facility level and has been designed to apply in the case of oil spills of any magnitude.[108] A complementary contingency plan applies in the case of chemical spills.[109]

In most instances, the initial responsibility for responding to an oil spill will lie with the local port authorities, who will then coordinate further responses with AMSA. These bodies are referred to as a combat agency, which within a port would be the port authority or the relevant State or Territory authority within a port. Recognising that some spills may be of a relatively minor nature, Tier 1 spills of less than 10 tonnes only requiring a local response are assigned to the local combat agency which in the case of a port would be the local authority. Larger, Tier 2 spills, of between 10-1000 tonnes are classified as ones which require a regional or national response and the local combat agency will in that case be supported by additional agencies. A spill of above 1000 tonnes is considered a large spill requiring national assistance.

It is common practice in Australia that following large spills a report is prepared on the response to the incident. The 1999 *Laura D'Amato* oil spill in Sydney Harbour resulted in an estimated 250-300 tonnes of light crude oil spilled into the harbour. This activated a response from personnel at the Shell Gore Bay terminal where the tanker was berthed, and also from

105 See ibid, s 66.
106 See ibid, ss 60A, 62, 63.
107 Australian Maritime Safety Authority, Australian Government, *National Marine Oil Spill Contingency Plan 2011* <www.amsa.gov.au/marine_environment_protection/national_plan/Contingency_Plans_and_Management/Oil_Spill_Contingency_Plan.asp>.
108 Ibid [1.3]-[1.6].
109 See Australian Maritime Safety Authority, Australian Government, *National Marine Chemical Spill Contingency Plan* <www.amsa.gov.au/marine environment_protection/national_plan/Contingency Plans and Management/Chemical_Spill_Contingency_Plan.asp>. See also the discussion in Chapters 4 and 10.

the Sydney Ports Corporation. Following formal notification of the spill to Sydney Ports Harbour Control, pre-planned emergency call-out procedures were activated which in this instance necessitated a response from a number of additional agencies, including the New South Wales Fire Brigade. Once the spill was contained attention was then directed to clean up operations along the harbour foreshore, which in total involved 557 persons from 32 agencies.[110] More recently, the 2006 *Global Peace* incident occurred in the Port of Gladstone after the bulk carrier was struck by a tug resulting in a breach of the ship's hull and loss of 25 tonnes of heavy fuel oil. In that instance the Port of Gladstone's First Strike Oil Spill Response Plan was activated, with Maritime Safety Queensland assuming relevant statutory and combat agency responsibility. The spill was contained and clean up completed within six days. A significant statutory dimension of this response was that the Gladstone City Council, notwithstanding their equipment and infrastructure available to respond to this incident, declined to do so because of uncertainty regarding their statutory responsibility.[111]

The *Shen Neng 1* incident in 2010 also highlighted issues that may arise for a port or harbour following a request being made for a place of refuge. In that incident, following the grounding of the *Shen Neng 1* on Douglas Shoal offshore the Port of Gladstone, salvors made a request to AMSA that the ship be taken to the sheltered waters of the Port of Gladstone so that cargo could be offloaded in preparation for the eventual towage of the ship to a port in Asia for repair.[112] AMSA issued a direction under the *Protection of the Sea (Powers of Intervention) Act 1981* (Cth) under which the Port of Gladstone was designated as a place of refuge which directed the salvors to relocate the *Shen Neng 1* to that place.[113] Eventually, due to unfavourable weather an attempt to relocate the ship to Gladstone was abandoned and instead a place of refuge was designated in Hervey Bay (Qld).[114]

110 Australian Maritime Safety Authority, Australian Government, *The Response to the Laura D'Amato Oil Spill: Report of the National Analysis Team* (April 2000) <www.amsa.gov.au/publications/marine_environment_protection/laura_damato_spill.pdf>.

111 Australian Maritime Safety Authority, Australian Government, *The Response to the Global Peace Oil Spill: Response of the National Analysis Team* (September 2006) <www.amsa.gov.au/publications/global_peace_report.pdf>.

112 Australian Transport Safety Bureau, Australian Government, *Independent investigation into the grounding of the Chinese registered bulk carrier Shen Neng 1 on Douglas Shoal, Queensland 3 April 2010* (ATSB Transport Safety Report, Marine Occurrence Investigation No 274, MO-2010-003, Final) 37.

113 See *Protection of the Sea (Powers of Intervention) Act 1981* (Cth) s 10(1)(b).

114 Australian Transport Safety Bureau, above n 112, 38; see also Australian Maritime Authority, *Fact Sheet: Shen Neng 1 Place of Refuge Request* <www.amsa.gov.au/marine_environment_protection/shen_neng_1_grounding/media/Shen%20Neng%201%20Hervey%20Bay%20Place%20of%20Refuge%20explanatory.pdf>.

8.5.4 *Ballast Water*

A matter of particular international and also national concern over the past decade has been the exchange of ballast water by large commercial shipping passing in and out of ports. Ballast water exchange has been proven to pose significant environmental hazards for the coastal and marine environment, and ports and harbours often bear the brunt of the environmental impact because this is traditionally where this exchange takes place. In particular, ballast water exchange has resulted in the introduction of invasive species, organisms and pathogens which have survived the journey from one port to another.[115] In response the international community adopted in 2004 the *International Convention for the Control and Management of Ships' Ballast Water and Sediments*.[116]

Ballast water has been recognised as posing particular threats to Australian ports and harbours and the Australian marine environment, with the Australian Quarantine and Inspection Service (AQIS) initially taking action in 2001.[117] Under current AQIS Australian Ballast Water Management Requirements,[118] foreign ballast water can only be discharged within the territorial sea if those requirements have been met. There is a presumption of non-discharge of "high risk" ballast water in Australian ports and harbours, though exemptions do apply in the case of force majeure. Individual ports and harbours around Australia have also undertaken risk management strategies to deal with ballast water discharge, as a result of which it has been determined that some ports are at more risk than others.[119] This can be due to the level and type of maritime traffic which a port receives, and the coastal and marine environment. Victoria has a dedicated Waste Management Policy on Ships' Ballast Water promulgated under the *Environment Protection Act 1970* (Vic) which distinguishes between internationally-sourced and nationally-sourced ballast water and applies to all ships within Victorian State waters.[120]

115 See generally Jeremy Firestone and James I. Corbett, "Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species" (2005) 36 *Ocean Development and International Law* 291.

116 Opened for signature 13 February 2004, [2005] ATNIF 18 (not yet in force).

117 See *Quarantine Act 1908* (Cth) ss 78A, 78AA.

118 AQIS, Australian Government, *Australian Ballast Water Management Requirements – Version 4* (March 2008) <www.daff.gov.au/aqis/avm/vessels/ballast/australian_ballast_water_management_requirements_-_version_4>.

119 See eg Fremantle Ports Western Australia, *Ballast Water Management in Western Australia* (May 2002) <www.fremantleports.com.au/EnvironmentSafety/BallastWater.asp>.

120 Victoria, *Waste Management Policy (Ships' Ballast Water)*, Gazette No S 100, 27 April 2004.

8.6 Port and Harbour Development

8.6.1 *New Ports*

The development of any new port in Australia, whether at a State or Territorial level, or even within Commonwealth jurisdiction,[121] would trigger a range of statutory mechanisms dealing not only with the development activity, but also environmental impact assessment eventually requiring comprehensive environmental evaluation. Depending on the size and scale and location of the development, the controlling provisions of the *Environment Protection and Biodiversity Conservation Act* would also most likely be triggered. Notwithstanding already developed port and harbour facilities around Australia, new mining ventures have prompted the need to develop or expand existing facilities. The Gorgon Project on Barrow Island (WA) has sought to develop onshore and offshore gas fields off the Western Australian coast, resulting in the need for LNG shipping facilities to handle regular shipments of gas to international markets.[122] Likewise, developments are also taking place on Curtis Island (Qld) as part of a LNG project, though in this instance the port developments are associated with the Port of Gladstone.[123]

Depending on the size and scope of the development project, the development or expansion of a port may necessitate special legislation. In the case of Barrow Island, the Western Australian government enacted the *Barrow Island Act 2003* (WA) so as to facilitate development activities on the island associated with LNG extraction and shipment, within which an agreement entered into between the State government and the joint venturers was annexed. That agreement envisaged the eventual development of proposals for shipping facilities and services to be developed.[124] However, while State laws may seek to facilitate these developments, it will not be possible to circumvent the need for Commonwealth approval under the *Environment Protection and Biodiversity Conservation Act* should a matter of national environmental significance be identified. In the case of the Curtis Island LNG project, in 2009 the federal Environment Minister determined

121 Such as those ports located in external territories.

122 See Department of State Development, Western Australian Government, *Gorgon Project (Barrow Island)* <www.dsd.wa.gov.au/7599.aspx>.

123 Another project proposal exists for the development of the Balaclava Island Coal Terminal, 40 kilometres north of Gladstone (Qld), which would see the development of coal loading facilities for shipping. This area is controlled by the Gladstone Port Corporation: Department of Local Government and Planning, Queensland Government, *Balaclava Island Coal Export Terminal (BICET)* <www.dlgp.qld.gov.au/balaclavaisland>.

124 *Barrow Island Act 2003* (WA) Sch 1.

the project to be a "controlled action" for the purposes of the *Environment Protection and Biodiversity Conservation Act*,[125] therefore requiring assessment and approval before it could proceed. In 2011, the minister approved the proposed development subject to controlling provisions with respect to World Heritage properties, Natural Heritage Places, listed threatened species and communities, and listed migratory species.[126] Amongst a total of 93 conditions imposed upon the project were provisions dealing with dredging operations associated with a construction dock, development of a Shipping Activity Management Plan, development of environmental management plans for migratory shorebirds and marine turtles, and arrangements for eventual decommissioning.[127]

The requirement to obtain Commonwealth approvals under the *Environment Protection and Biodiversity Conservation Act* in relation to these types of developments should not be underestimated, as is highlighted by the Shute Harbour Marina Development on the central Queensland coast. This project involved the development of a solid breakwater marina capable of housing over 600 berths, with accompanying marina facilities including a hotel and accommodation. Originally proposed in the early 2000s, and subject to a required environmental impact statement under Queensland law,[128] this project was also declared to be a "controlled action" by the federal minister under the *Environment Protection and Biodiversity Conservation Act* in 2006 with controlling provisions dealing with world heritage, listed and threatened species and the marine environment.[129]

8.6.2 *Dredging and Channel Deepening*

Australia has many major ports and harbours scattered around the country with well-developed facilities. However, with changes in ship design and their size, issues have arisen as to the adequacy and safety of certain shipping channels and this has necessitated dredging operations in order to deepen ports and associated channels.[130] In some instances, the normal maintenance

125 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67.

126 Department of Sustainability, Environment, Water, Population and Communities, Australian Government, *Approval: Australian Pacific LNG Project – Development of a LNG Plant and Ancillary Onshore and Marine Facilities on Curtis Island – EPBC 2009/4977* (21 February 2011).

127 Ibid.

128 *State Development and Public Works Organization Act 1971* (Qld).

129 Department of Local Government and Planning, Queensland Government, *Shute Harbour Marina Development* <www.dlgp.qld.gov.au/projects/tourism-arts-and-recreation/marina/shute-harbour-marina-development.html>.

130 Fremantle Ports Western Australia, *Fremantle Inner Harbour dredging resumes* (10 August 2010) <www.fremantleports.com.au/News/News/News%20Archive%202010/Fremantle%20Inner%20Harbour%20dredging%20resumes.PDF>.

of shipping channels requires they be dredged on a regular basis in order to deal with silt. These actions raise legal questions with respect to development and waste management, and have highlighted the interaction of relevant State and Commonwealth environmental laws.

In 2002 the Port of Melbourne Corporation[131] commenced a channel deepening project for parts of Port Phillip Bay (Vic). The aim of the project was to allow access by 14 metre draught vessels to the Port of Melbourne in all tidal conditions. In total the project involved the dredging of 22.9 million cubic metres of material throughout the bay and areas adjacent to the port. Under Victorian law, an environment effects statement (EES) was sought and provided under the *Environment Effects Act 1978* (Vic).[132] A ministerial inquiry was appointed under the Act,[133] and hearings were conducted in 2004-2005, after which a supplementary EES was also sought. The outcome of this process was that the effects of the dredging and spoil disposal works were judged as being "minor, acceptable and /or short term"[134] and approval was given for the project. However, the project was also one to which the *Environment Protection and Biodiversity Conservation Act* applied because of several triggers under the Act, including declared Ramsar wetlands,[135] listed threatened species, listed migratory species, and the environment of Commonwealth land. Foreshadowing and then following approval given under the Act by the federal minister, Blue Wedges, a recently incorporated environmental association, contested the minister's determination in the Federal Court.[136] After a thorough review of the minister's decision-making process including published reasons, North J concluded that the minister had acted properly and where applicable had taken into account the principles of ecologically sustainable development as is required under the Act.[137] In an important observation with respect to any additional factors the minister was required to take into account under the Act, North J noted:

131 Established under the *Port Services Act 1995* (Vic).

132 *Environment Effects Act 1978* (Vic) s 3 provides that the Act applies to all works declared to be public works for the purposes of the Act.

133 Ibid, s 9.

134 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463, 469 [26].

135 The Ramsar wetland is "Port Phillip Bay (Western Shoreline) and Bellarine Peninsula" and is 22,897 hectares in size.

136 See the matter at first instance in *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 165 FCR 211.

137 *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 167 FCR 463, 492-493 [124]-[125] referring to *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(2)(a).

> There is nothing in the subject matter, scope or purpose of the Act which required the Minister to take into account the impact of maintenance dredging, the impact of oil or chemical spills or the impact of the removal and disposal of toxic sediment in the north of the Bay.[138]

The challenge to the minister's determination under the *Environment Protection and Biodiversity Conservation Act* was unsuccessful and therefore dismissed.[139] The Port Phillip Bay channel deepening project therefore proceeded.[140]

The impact of dredging was also considered in *Friends of Hinchinbrook Society v Minister for the Environment*[141] in the context of the *World Heritage Properties Conservation Act 1983* (Cth), the predecessor to the *Environment Protection and Biodiversity Conservation Act* with respect to the conservation and management of world heritage areas in Australia. In that instance the dredging of a marina channel along the Queensland coast adjacent to Hinchinbrook Island was under review, not only with respect to the development activity itself but also its potential impact upon dugong in those waters. While the minister found that there was the potential for environmental impact arising from the dredging activity, including maintenance dredging, it was determined that the impact was not significant and that dredging operations could be managed to minimise impact.

8.7 Concluding Remarks

The regulation and management of ports and harbours in Australia has a long history in which the States have played a prominent role. However, as a result of the growth in environmental consciousness, the demands of sustainable development, and the expansion of Commonwealth powers over the environment, the Commonwealth has begun to play a greater role in ports and harbour development and management. This is especially reflected not only through the *Environment Protection and Biodiversity Conservation Act*, but also through central Commonwealth agencies such as AMSA which are responsible for coordinating and responding to maritime incidents around Australia, including some which occur within ports and harbours. As ports

138 Ibid, 490 [117].

139 For discussion of this case see Rachel Baird, "Public interest litigation and the Environment Protection and Biodiversity Conservation Act" (2008) 25 *Environmental and Planning Law Journal* 410, 410-415.

140 For discussion of this project see Brad Jessup, "The Port Phillip Channel Deepening Project and Environmental Law: A Model for Ecologically Sustainable Development" in Warwick Gullett, Clive Schofield and Joanna Vince (eds), *Marine Resources Management* (LexisNexis Butterworths, 2011) 297-310.

141 *Friends of Hinchinbrook Society v Minister for the Environment (No 3)* (1997) 77 FCR 153.

and harbours are redeveloped, expanded or created, there will be ongoing tensions between the economic need for development of key infrastructure and environmental management. Therefore, like much of the Australian coastal and marine environment, ports and harbours will remain subject to the interweaving operation of Commonwealth and State laws and regulations, resulting in complexity in their regulation and management.

Chapter 9

Shipping

Craig Forrest

9.1 Introduction

Shipping is vital to the Australian economy.[1] With its wealth in natural resources, the Australian economy is fuelled by the export of vast quantities of hard and soft commodities particularly iron ore, coal, aluminium, timber and grain.[2] Whilst certain bulk commodities, such as oil and petroleum products, are imported, most Australian imports are manufactured goods. Almost all this export and import trade is carried in ships.

The type of ship needed to carry heavy, dirty cargo such as iron ore, coal and petroleum, pose significant environmental hazards to the ports in which they load[3] and the seas through which they sail, particularly since most of the sailing routes require these ships to travel through environmentally unique and sensitive waters such as the Great Barrier Reef and the Torres Strait. The type of ship needed to carry large bulk cargo is typically about 150 to 200 metres in length and around 58,000 deadweight tonnes, but can be over 80,000 deadweight tonnes and 343 metres in length. Whilst adhering to international standards of safety and navigation, grounding and sinking of these large ships continue to occur; most recently the groundings of the bulk carriers *Pasha Bulker* off Newcastle in 2007 and *Shen Neng I* on the southern tip of the Great Barrier Reef in 2010. These ships not only pose environmental hazards when things go wrong, they can pose a number of hazards merely through unregulated operations that allow sewage, fuel, lubricating oils,

1 In 2006-2007, 830 million tonnes of goods crossed Australian wharves, exceeding $275 billion in value: Department of Infrastructure, Transport, Regional Services and Local Government, Australian Government, "Australian Sea Freight 2006-2007" (Information Paper No 61, Bureau of Infrastructure, Transport and Regional Economics, 2008) xiii.

2 In 2008-2009, exports included 283 million tonnes of iron ore, 264 million tonnes of coal, 19 million tonnes of grain, 18 million tonnes of aluminium, and 11 million tonnes of timber. See <www.portsaustralia.com.au>.

3 Large quantities of iron ore and coal are exported through specialised ports, such as Dampier, Port Hedland, Port Walcott, Hay Point, Gladstone, Newcastle and Port Kembla.