



# Anchorage

## Jurisdictional responsibility for anchorages in Queensland

This paper outlines the jurisdictional issues to consider when designating and managing anchorages in Queensland. This paper is for discussion purposes only and does not reflect current policy.



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# 1. Introduction

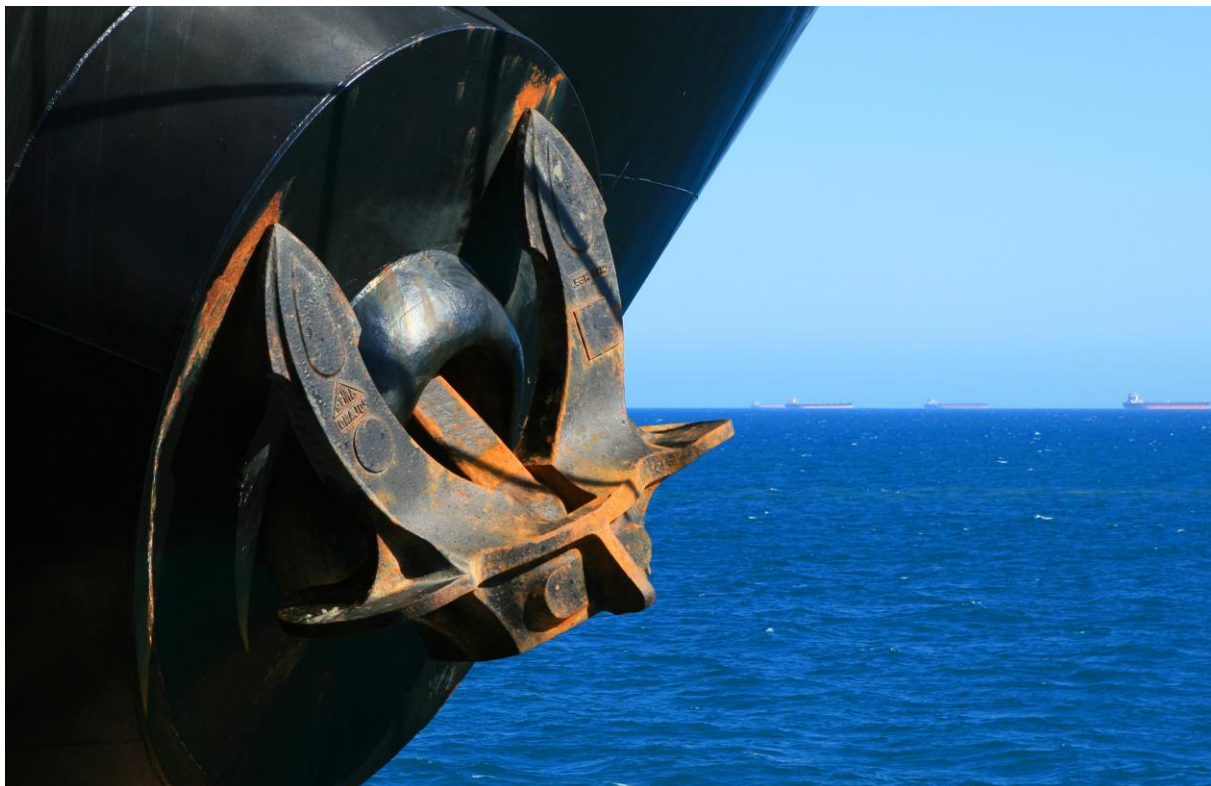
For reasons of safety, timing or operational efficiencies, it is common practice for large commercial trading ships to arrive outside a port and anchor. This may be while awaiting their turn to enter the port to effect cargo operations (or other activities), avoid bad weather or seek a port of refuge. Anchoring can be at specific, and individually chartered, anchorage locations designated by an authority (for example, a Harbour Master) within a more generally defined anchorage area (or roads) or at a suitable location, chosen by the ship's master.

Having designated anchorages allows a port authority or Harbour Master more flexibility to manage efficiently the movement of ships and minimise the potential impact on the environment of anchoring. It also reduces the need for a ship's master (who may have little to no local knowledge) to select on an optimum anchorage position.

For efficiency purposes, anchorages are generally located in close proximity to ports, within areas of good holding ground, near sheltered waters (where possible) and may be close to pilot boarding places.

The laws governing Australian offshore waters are complex, with overlapping boundaries and responsibilities. Issues associated with shipping in these waters generally call for the involvement of more than one agency, and there are often competing operational priorities or outcomes. It may also be unclear as to which agency which has primary responsibility for anchorages.

There are a number of agencies and legislative provisions in place that address, or can affect, the potential locations and final use of anchorages. This has led to some confusion for some stakeholders over who has the head of power and lead role in designating and managing anchorages in Queensland.





## 2. Background

The North-East Shipping Management Group (NESMG) is made up of Commonwealth and State government agencies. NESMG was directed to develop a shipping management plan for the North East Region (being the Torres Strait, Great Barrier Reef and the Coral Sea). The North East Shipping Management Plan (NESMP) was released in October 2014 and is focussed on mitigating the possible impacts of large commercial trading ships on sensitive marine environments and their ability to navigate safely.

One of the actions identified in the NESMP is for the North-East Water Space Management Working Group (NESMWG), being a sub group of the NESMG, to contribute to the development of a ship anchorage management study and implement proposed management strategies associated with offshore ship anchorages in the Great Barrier Reef (GBR) World Heritage Area. The study is to also consider aesthetics in its review of anchorage assessments (NESMP Action 28).

The NEWSMWG held a workshop on 14 October 2014 to develop a draft work plan on anchorage matters.

Attendees at the workshop agreed to seven (7) work items to address issues associated with anchorages. One of those items, is this paper which aims to:



### **Work Plan Item 6: Clarify aspects of related jurisdictional uncertainty and develop a communication package for stakeholders.**

Taking into consideration:

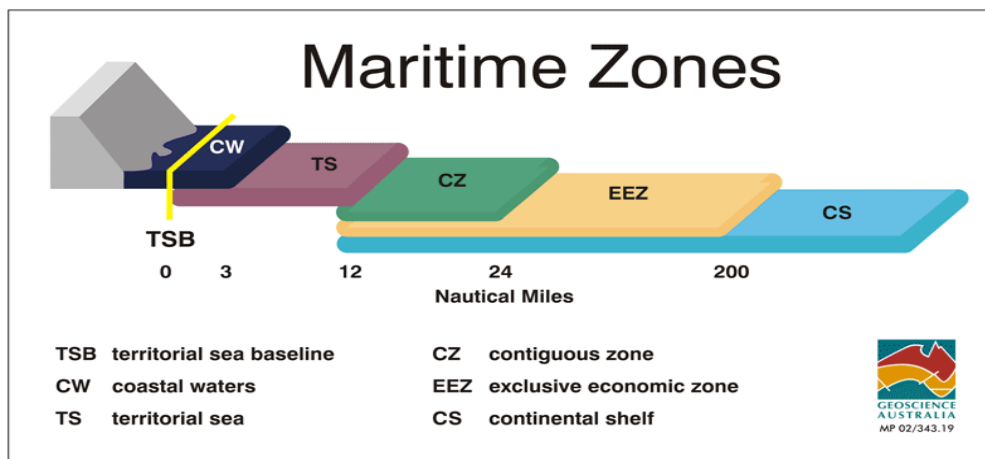
- Clarification of the legal and governance issues surrounding anchoring practices in State and Commonwealth waters, for example:
  - Directing ships where to anchor, will not interfere with innocent passage;
  - States can legally regulate activities beyond the 3nm State/ Federal boundary if such activities are directly linked to the benefit of the State.
- Scope options for a central agency to be the decision maker.
- The management of ships at anchor and the dependencies on the relationship with ports and available facilities.

### 3. International Laws

A purpose of the United Nations Convention of the Law of the Sea (LOSC) is to codify a set of international rules governing the world's oceans and also to replace previous United Nations conventions concerning the law of the sea. The law of the sea, as a body of international law, is a product not only of the LOSC but of a large number of other instruments administered by a wide range of national and international authorities, in addition to the rules of customary international law.

As an island continent, Australia has sovereign rights over a vast area of ocean, along with the fishery, mineral, and petroleum resources found in that area. In order to understand some of the issues in Australia's Maritime Jurisdiction, it is important to have a general understanding of some maritime jurisdiction terms including Territorial Sea Baseline, Coastal Waters, Territorial Sea, Contiguous Zone and Exclusive Economic Zone.

- Territorial Sea Baseline (TSB) refers to the line from which the seaward limits of Australia's Maritime Zones are measured
- Coastal Waters is a belt of water not exceeding 3NM in width measured from the territorial sea baseline within which jurisdiction has been vested in the adjacent State or Territory
- The Territorial Sea is a belt of water not exceeding 12NM in width measured from the territorial sea baseline and delineates Australia's sovereignty
- The Contiguous Zone is a belt of water not exceeding 24NM in width measured from the territorial sea baseline where Australia may exercise control necessary to prevent and punish infringement laws and regulations within its territory or territorial sea.
- The Exclusive Economic Zone (EEZ) is an area beyond and adjacent to the territorial sea out to 200NM. Australia has sovereign rights in this area for the purpose of exploring and exploiting, conserving and managing all natural resources.



#### 3.1 Innocent passage – territorial sea

Subject to the LOSC, ships of all States enjoy the right of innocent passage through the territorial sea. In general terms, the “territorial sea” is the band of water not exceeding 12 nautical miles, measured from the baselines, which are determined in accordance with the LOSC.

- Meaning of “passage”

Article 18 of the LOSC provides that “passage” means navigation through the territorial sea for the purpose of:

- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
- (b) proceeding to or from internal waters or a call at such roadstead or port facility.

Article 18 goes on to provide that passage must be continuous and expeditious. Passage includes stopping and anchoring, but only in so far as those are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

- Meaning of “innocent”

Article 19 of the LOSC provides that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Article 19(2) of the LOSC sets out the circumstances in which passage is considered to be prejudicial to the peace, good order or security of the coastal State.

- Coastal State – regulation of maritime traffic in the territorial sea

Article 21 of the LOSC provides that the coastal State may adopt laws and regulations (consistent with the LOSC and international law generally) relating to innocent passage through the territorial sea, in respect of the safety of navigation and the regulation of maritime traffic.

- Freedom of navigation in the exclusive economic zone

Article 55 of the LOSC provides that the exclusive economic zone (EEZ) is an area beyond and adjacent to the territorial sea. The EEZ of a coastal State must not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Within the EEZ, ships of all States enjoy the freedoms referred to in article 87 of the LOSC, which explicitly includes the freedom of navigation.

## 3.2 International law and Australia’s Federation

A well-established part of customary international law is that Federated States (such as Australia and the USA) constitute a sole person under international law. In lay person’s terms, this means that Queensland (QLD) is Australia for the purposes of international law.

A consequence of this rule is that QLD law is subject to the same international law constraints which limit the application and enforcement of Commonwealth law to foreign vessels, depending on their location. For instance, QLD laws should not apply to circumvent well-established rules about the exercise of sovereignty and sovereign rights against foreign flagged vessels which are codified by the LOSC.

This generally means the freedom of navigation enjoyed by all foreign vessels within Australia’s EEZ should not be interfered with. The application of compulsory and valid measures such as Harbour Master directions, instructions and so forth about anchorages (as well as potential corresponding offences) which might be designated in territorial sea, should not be extended so as to restrict the freedom of navigation in the EEZ. There is of course nothing to prevent the master of a foreign vessel from voluntarily adopting or complying with the same.

Having regard to the nature of “anchorages” as contemplated in this paper, neither the right of innocent passage in the territorial sea, nor the freedom of navigation in the EEZ are likely to be affected by the designation of “anchorages”. The development of any compliance and enforcement mechanisms under domestic law (either that of the Commonwealth or the States) would of course need to take proper account of these and other relevant matters.

## 4. National Laws and Agencies

In the early 1970s, the States challenged the Commonwealth's assertion of sovereignty under the *Seas and Submerged Lands Act 1973* (SSLA) over the then 3NM territorial sea. The High Court upheld the Commonwealth's assertion of sovereignty in the *Seas and Submerged Lands Case*. The Commonwealth and the States subsequently came to a series of agreements collectively known as the Offshore Constitutional Settlement (the OCS). The purpose of the OCS was to give the States a greater legal and administrative role in offshore areas. The principal legislation implementing the OCS (the *Coastal Waters (State Powers) Act 1980* (Coastal Waters Act) commenced in February 1983.

There are two fundamental elements underpinning the OCS arrangements.

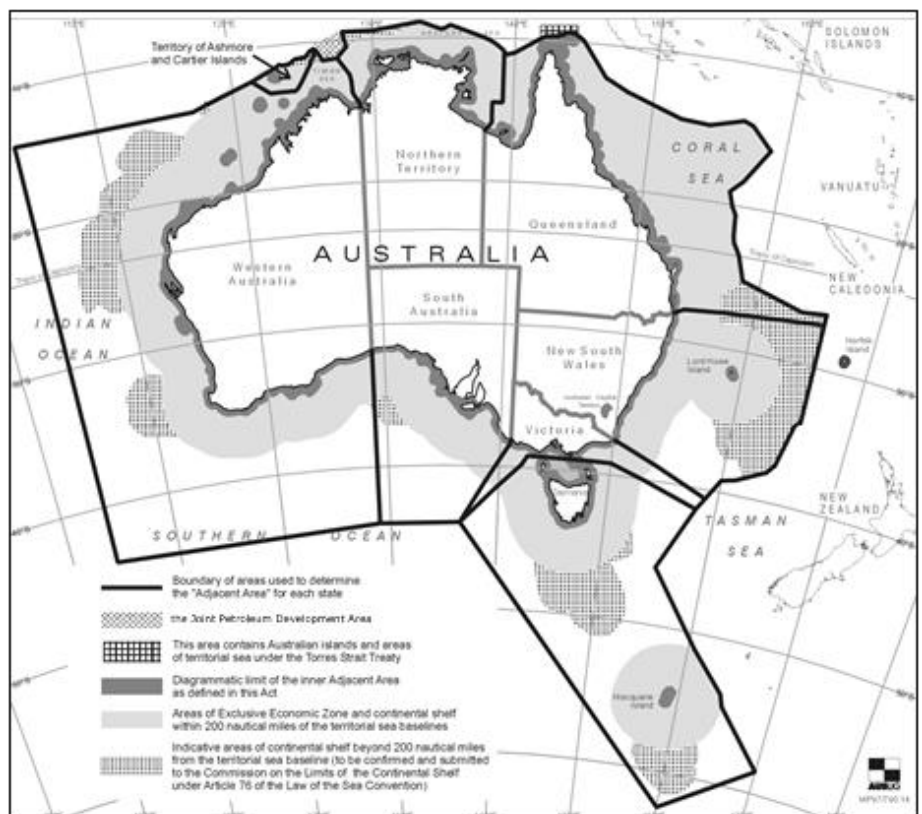
First, the States and NT were given title to an area called 'coastal waters' consisting of all waters landward of the 3NM limit, but not including internal waters that are within the constitutional limits of a State, for instance, Sydney Harbour.

Second, and importantly in the present context, the States and NT were given concurrent legislative power over coastal waters; that is they were given the same power to legislate over coastal waters as they would have over their land territory. The legislation implementing the OCS made it clear that should the territorial sea be extended (and it was, in 1990, to 12NM from the baseline) the OCS arrangements would continue to apply only to the 3NM limit.

The Coastal Waters Act goes on to provide that the legislative powers exercisable from time to time under the constitution of each State extend to the making of laws of the State, having effect in or in relation to waters within the 'adjacent area' in respect of the State...being laws with respect to ports, harbours and other shipping facilities.

The 'adjacent area' for a State, in a nutshell, means the areas depicted in the diagram below, below. Adjacent areas extend well beyond 3NM.

Whilst open to legal interpretations, an 'anchorage' would be a 'shipping facility' within the meaning of section 5(b)(ii) of the Coastal Waters Act, since it facilitates the safe management of shipping in a particular and identified area. It follows that a State may make laws in relation to 'anchorages'. There does not appear to be any Commonwealth legislation which enables a Commonwealth agency to 'control' all anchorages and, so it follows, from a strictly legal perspective, that dealing with anchorages is primarily a State matter.



### 4.1 Australian Maritime Safety Authority

The national maritime safety regulator is the Australian Maritime Safety Authority (AMSA). As outlined above, as a Commonwealth agency AMSA has limited jurisdiction to exercise regulatory control over



anchorage. It does however make good practical sense that a consistent approach be adopted across Australian jurisdictions, so AMSA may have a role to play in a strategic/national coordination sense.

AMSA retains powers and functions with regards to the safe operations of the classes of ships typically expected to use anchorages and will exercise its powers and functions accordingly and as Commonwealth law permits.

In particular, AMSA has a clear interest in the management of ships at anchor to ensure compliance with international conventions, for instance SOLAS ISM, STCW, discharge (MARPOL, but only where State law does not apply) and various powers of intervention, as usually apply. AMSA's powers to give directions, mentioned in s 246 of the Navigation Act 2012 may also be relevant, as applicable to foreign ships.

Hence there may be a role for AMSA to play to help bring about more consistent national approach to the establishment and operation of ship anchorages.

## 4.2 Great Barrier Reef Marine Park Authority

The Great Barrier Reef Marine Park Authority (GBRMPA) is an Australian Government statutory agency responsible for protecting and managing the environment, biodiversity and heritage values of the Great Barrier Reef Region. The principle legislation that GBRMPA operates under is the Great Barrier Reef Marine Park Act 1975.

The Great Barrier Reef Marine Park Act provides for the long-term protection and conservation of the environment, biodiversity and heritage values of the region. It allows for ecologically sustainable use and encourages stakeholder engagement in protecting and managing the region.

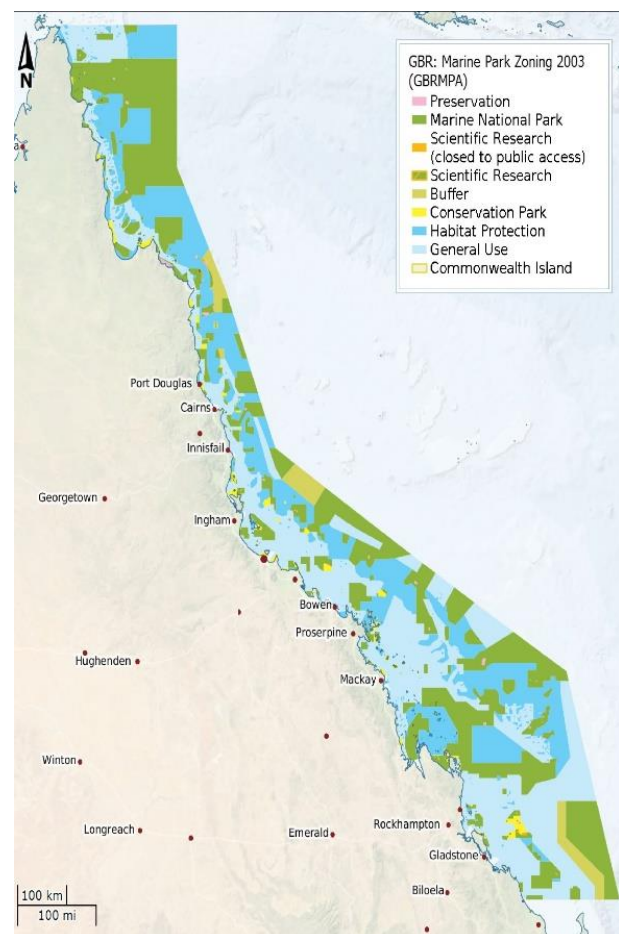
The authority uses a number of tools to protect and manage the region, including zoning plans, plans of management, permits, policies and strategies, formal agreements and site management arrangements.

The Great Barrier Reef Marine Park Zoning Plan 2003 does not appear to contain specific reference to anchorages being prohibited, although it does define a designated shipping area for ships to travel within the Great Barrier Reef Marine Park (GBRMP).

The current zoning plan states that the objective of the Designated Shipping Area (DSA) is 'to make provision for the navigation of ships'. It goes on to state: 'a shipping area may be used or entered without permission for the navigation of a ship if any equipment on the ship that is normally used for fishing or collecting is stowed or secured while the ship is in a Zone or part of a Zone, or another Area, in which the use of the equipment is not permitted under this Zoning Plan.' The definition of navigate according to the Zoning Plan is 'includes moor, or anchor, in the course of navigation'.

It is GBRMPA's view that the activity of navigating a ship, which includes anchoring, does not require a permission from GBRMPA if conducted in the DSA.

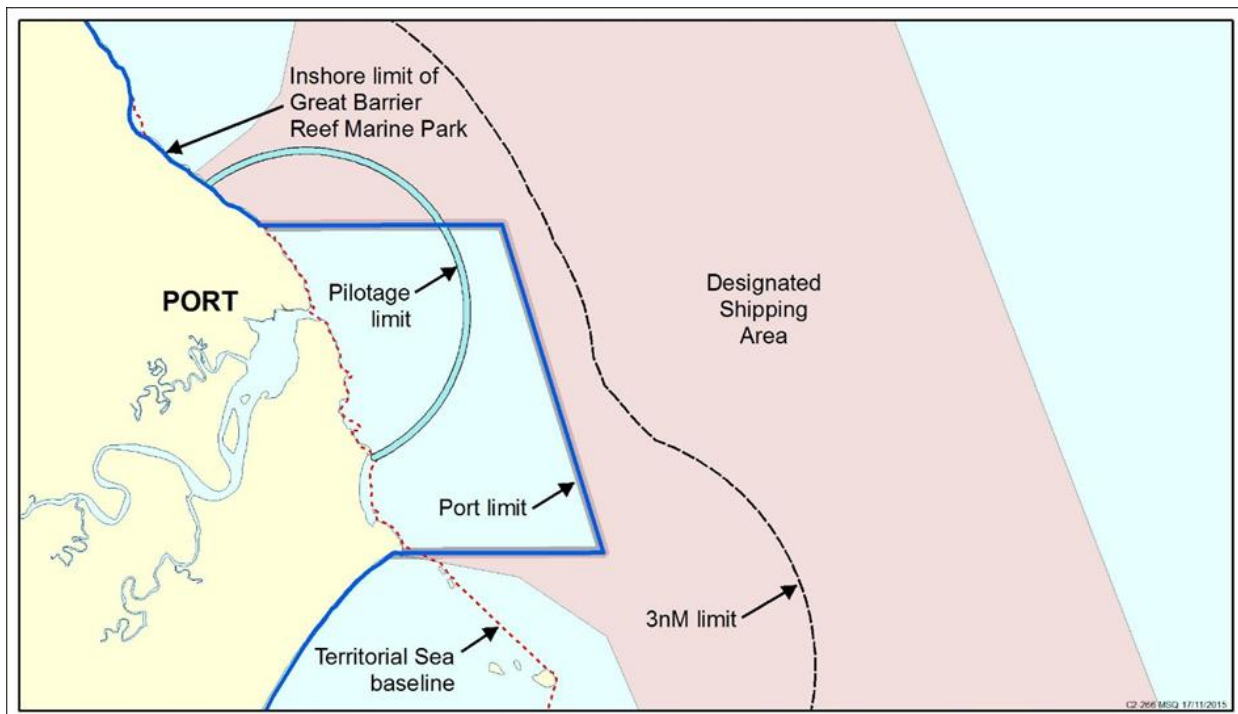
It is noted that all current and proposed anchorages within the GBRMP are within the extant DSA.



## 5. State Powers

In order to understand some of the issues in Queensland Coastal Waters it is important to understand the definitions of a number of terms including Pilotage Area, Port Limits, the DSA and Marine Park boundaries.

- Pilotage Areas are defined under Transport Operations Marine Safety Act 1994 (TOMSA) and reference the area where the Harbour Masters has certain powers to direction ships
- Port Limits mark the area within which, under the Transport Infrastructure Act 1994, the port authority has power to operate a port
- Ships travelling through the Great Barrier Reef Marine Park may only navigate within the DSA and the General Use Zone.
- Queensland is the only State with a Commonwealth marine park (GBRMP) abutting its coast at low water. The exact location of the inshore boundary of Commonwealth jurisdiction is unknown in many locations. Queensland marine parks cover the shore between high and low water marks and extending some distance to sea with zoning which complements that of the GBRMP



**Typical maritime boundaries associated with a QLD port abutting GBRMP**

### 5.1 Maritime Safety Queensland

The State of Queensland's maritime regulator is Maritime Safety Queensland (MSQ), a Branch of the Department of Transport and Main Roads. MSQ's role is to protect Queensland's waterways and the people who use them - providing safe, clean seas.

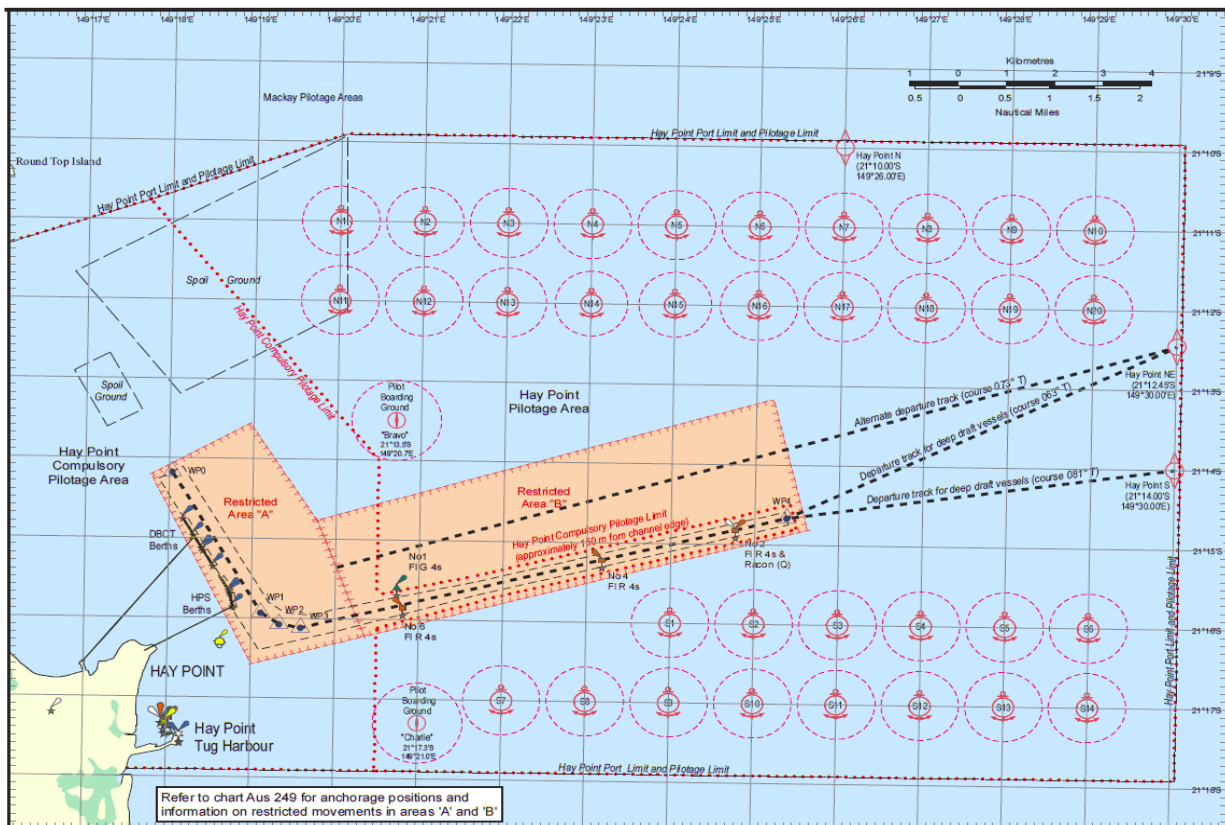
The principle legislation in Queensland for managing ship activity and anchorages is the TOMSA and the *Transport Operations (Marine Pollution) Act 1995* (TOMPA). These provide MSQ with the head of power to regulate shipping in Queensland Coastal Waters and in some circumstances in the waters adjacent to Queensland Coastal Waters.

In Queensland, there is no specific legislation for the designation and approval of anchorages nor is there a standard process to follow to do so. Recently, MSQ undertook an external consultative process for the designation of potential anchorage locations for the ports of Townsville and Abbot Point. This has proved

a reasonably successful process and proven the successful use of Marine Spatial Planning (MSP) tools and concepts. However the process has shown that gaining consensus from all stakeholders may not always be possible and that compromises are sometimes necessary.

Under part 7 of TOMSA, Harbour Masters have the power to direct a ship waiting to use a Queensland port to anchor at a certain location, in or adjacent to the pilotage areas.

Harbour Masters' powers of direction under part 7 of the TOMSA are constrained to directions to ensure safety. The direction must have regard to the effectiveness and efficiency of the marine industry. In order for the Harbour Master to direct a ship to a particular anchorage location, and for added safety and efficiency of the port, MSQ has designated many uniquely identified anchorage locations. So that all mariners are aware of where these anchorages are located, MSQ promulgates this information through Port Procedure Manuals as well as requesting they be promulgated through Notices to Mariners and depicted on official navigation charts produced and maintained by the Australian Hydrographic Office.



**Chart showing the Port of Hay Point's Inner Anchorages (Port Procedures and Information for Shipping Manual – Port of Hay Point)**

TOMSA limits the powers of a Harbour Master for ships located outside 'Coastal waters', to ships 'connected with Queensland'. While open to legal interpretations, ships waiting to use a Queensland port can be considered to be ships 'connected with Queensland'. Therefore it is possible for a Harbour Master to direct a ship that is 'connected to Queensland' to an anchorage that is outside Queensland Coastal Waters.

A Harbour Master may direct any ship to use a specific anchorage. Such a direction, even to a foreign-flagged ship on an international voyage, does not restrict the ship's right of innocent passage.

## 6. Management of Vessels at Anchor

Through the powers of directions of a Harbour Master, specific conditions can be placed on the use of anchorages. A ship using an anchorage would at all times be subject to these specific conditions as they would be part of the Harbour Master's direction. Non-compliance with the direction of a Harbour Master is an offence under TOMSA and appropriate compliance actions could be initiated.

The concept of an anchorage being designated through the use of the powers of direction of a Harbour Master need not exclude other users of the waters. As previously mentioned, Harbour Master powers under TOMSA are constrained to directions to ensure safety, and the direction must have regard to the effectiveness and efficiency of the marine industry. Therefore the exclusion of other users from the anchorage area would only occur if there was a significant safety concern. For example, exclusion zone around visiting warships; exclusion zone around a maritime casualty; exclusion zone around ship to ship transfers.

MSQ operates five Vessel Traffic Service (VTS) centres at strategic ports along the Queensland coast. These VTS centres track and monitor the movement of ships in the Torres Strait, the Great Barrier Reef and Queensland ports. Each VTS centre falls under the control of a Regional Harbour Master. The VTS centres play a key role in coordinating the safe movement of regulated ships in ports and anchorage areas. MSQ documents the rules for ships visiting Queensland ports in its Port Procedures and Information for Shipping Manuals which are available online.

## 7. Ports

For reasons of safety, timing or operational efficiencies, it is common practice for large commercial trading ships to arrive outside a port and proceed to anchor. This may be while awaiting their turn to enter the port to effect cargo operations (or other activities), avoid bad weather or seek a port of refuge. Anchoring can either be at specific, and individually charted, anchorage locations designated by an authority, within a more generally defined anchorage area (or roads) or at a suitable location, chosen by the ship's master. The majority of Queensland's trading ports operate adjacent to the Great Barrier Reef.

Ships rely on ports for a variety of reasons, not only for the loading and unloading of goods. Ports provide services to resupply ship's stores of food, water and fuel (bunkers). They provide facilities to enable the ship to dispose of operational waste and garbage. They also offer an opportunity for the medical treatment for the ship's crew and ship repairs. While these activities are generally conducted when a ship is alongside a berth, many activities can be safely carried out at an anchorage.

In November 2015 the [Sustainable Ports Development Bill 2015](#) was passed by the Queensland Parliament. The new laws aim to balance the protection of the Great Barrier Reef with development of the State's major ports.

Historically, Queensland ports have focussed on land use planning within strategic port land. Port Authorities provide comment and advice to Maritime Safety Queensland on ship anchorage matters.

Under the new ports legislation it is mandatory for all priority ports to develop a port master plan. Port master planning will require consideration of issues beyond strategic port land including marine and land-based impacts, port and supply chain capacity and connectivity, environmental and community values. This plan may also include the consideration of designated anchorages and associated anchoring management practices.

## 8. Other Entities

It would be possible for any entity, for example a private port or private loading facility operator, to designate an anchorage, as a contractual matter relating to the use of the facility. In such a case, the designation would not have any legal effect on anyone other than parties to the contract.



## 9. Conclusion

There is no single national or State regulator that has the responsibility for designating and approving anchorages, nor is there currently a standard process to follow.

As anchorages are generally within or adjacent to coastal waters, it is considered that the relevant State agency is the most appropriate authority to determine and regulate designated anchorages with the assistance of the relevant Harbour Master.

In Queensland, MSQ has powers to direct a ship to an anchorage and for reasons of effectiveness, promulgates designated anchorage locations and the rules for using them via Port Procedure Manuals and official navigation charts.

Neither the right of innocent passage in the territorial sea, nor the freedom of navigation in the EEZ are likely to be affected by the designation of 'anchorages'. The use of appropriate powers to direct a ship visiting a port to use a designated anchorage does not restrict the ship's right of innocent passage.

It is possible for States to regulate anchorages outside of Coastal Waters as long as there is a valid connection to the State.

As anchorages are general inside or adjacent to Coastal Waters and the ships that use those waters can be interpreted as having a connection to the State, it is considered that the relevant State maritime safety agency is the most appropriate authority to determine and regulate designated anchorages.

MSQ recently consulted with key stakeholders to identify appropriate locations for designated anchorages at the ports of Townsville and Abbott point. This process has proven to be reasonably successful and could provide a basis for national guideline together with the adoption of Marine Spatial Planning (MSP) tools and principles.

There are a number of agencies and companies involved in the activities of a ship that has a need to spend time at anchor. Some of these are regulatory function and others are for commercial reasons. By working in a consultative and cooperative manner, the practice of ships using designated anchorages can continue in a safe and sustainable manner.

