



## Deemed applications under the Environment Protection and Biodiversity Conservation Act (EPBC Act)

Effective from 4 October 2017

### **Objective**

To explain the way the Great Barrier Reef Marine Park Authority works with the Australian Government department, requiring permission under both the Environment Protection and Biodiversity Conservation Act and the Great Barrier Reef Marine Park Act 1975.

### **Target audience**

Primary: Commonwealth staff involved in the permission system application and assessment process.  
Secondary: applicants for permission, the general public.

## Purpose

1. An understanding of how Commonwealth referral, assessment and decision processes for proposals within the Great Barrier Reef Marine Park (the Marine Park) are streamlined and coordinated.

## Related legislation / standards / policy

2. Refer to the [Permission System Policy](#) for a list of related legislation, standards and policy.
3. The Great Barrier Reef Marine Park Authority (GBRMPA) manages the Marine Park in accordance with the following legislation:
  - a. [Great Barrier Reef Marine Park Act 1975](#) (the GBRMP Act).
  - b. [Great Barrier Reef Marine Park Regulations 1983](#) (the Regulations).
  - c. [Great Barrier Reef Marine Park Zoning Plan 2003](#) (the Zoning Plan).
4. The [Environment Protection and Biodiversity Conservation Act 1999](#) (the EPBC Act) is Australia's national environment law.

## Context

5. The EPBC Act establishes a national assessment and approval process, which focuses on the protection of matters of national environmental significance (MNES). The Department of the Environment and Energy (the Department) administers the EPBC Act on behalf of the Minister for the Environment and Energy (the Minister). There are nine MNES, including the Marine Park, which are afforded protection under the EPBC Act.
6. Some proposals require permission under the GBRMP Act and Zoning Plan as well as an approval under the EPBC Act before they can proceed. A [Memorandum of Understanding \(MoU\)](#) between GBRMPA and the Department describes how the two agencies will work together when activities require assessment under both the EPBC Act and the GBRMP Regulations. The goal of the MoU is to provide effective integration and streamlining of regulatory requirements.
7. The MoU also describes how GBRMPA advises the Department on EPBC Act assessments for activities which do not require Marine Park permission, but which may have consequential impacts on the Marine Park if not managed appropriately.
8. The terminology used in the GBRMP Act and Regulations differs to that used in the EPBC Act. While not identical, the following terms are broadly comparable (refer to Table 1).

**Table 1.** Terminology used in the GBRMP Act and Regulations compared with terminology used in the EPBC Act

GBRMPA legislation terminology	EPBC Act equivalent terminology
<ul style="list-style-type: none"> <li>Applicant</li> </ul>	<ul style="list-style-type: none"> <li>Proponent</li> </ul>
<ul style="list-style-type: none"> <li>Use, entry, conduct or activity</li> </ul>	<ul style="list-style-type: none"> <li>Action</li> </ul>
<ul style="list-style-type: none"> <li>Application</li> </ul>	<ul style="list-style-type: none"> <li>Referral</li> </ul>
<ul style="list-style-type: none"> <li>Assessment</li> </ul>	<ul style="list-style-type: none"> <li>Assessment</li> </ul>
<ul style="list-style-type: none"> <li>Permission</li> </ul>	<ul style="list-style-type: none"> <li>Approval</li> </ul>

### EPBC Act referral deemed applications

- Where there is a referral under the EPBC Act and the proposed action (or a component of the action) involves doing something that would be an offence under the GBRMP Act, if done without a permission under the Regulations, the referral is taken to be an application made in accordance with the Regulations for that permission for GBRMPA's purposes (see section 38AB of the Act). This is referred to in the Regulations as an EPBC referral deemed application (deemed application).
- Under the MoU, the Department will provide a copy of the referral to GBRMPA within 5 days of receiving it.
- Whilst each agency undertakes its own separate assessment of the relevant components of the proposed action, there are various aspects of the process that are coordinated through the MoU where both agencies will contribute to part of the process. See Figures 1 and 2 for an overview of how the agencies work together to assess deemed applications.

### Exceptions

- Deemed application provisions were added to the GBRMP Act and Regulations in 2009. If an action has a valid EPBC approval which was granted before 2009, it may still require a separate permission application, assessment and decision by GBRMPA. In such cases, normal GBRMPA permission application and assessment processes will apply (refer to the Permission System Policy for more information). Such cases are not deemed applications.
- Referral under the EPBC Act may not be required if the action pre-dates the introduction of the EPBC Act in 1999. However, Marine Park permission may still be needed. Normal GBRMPA permission application and assessment processes will apply. Such cases are not deemed applications.
- If an action pre-dates the introduction of the EPBC Act, referral under the EPBC Act may still be required if a significant change is proposed. This could result in a deemed application for GBRMPA.

### EXAMPLES

- The owners of an island resort hold a valid EPBC approval to build a marina in the Marine Park, which was granted in 2005. The resort owners do not yet have Marine Park permission for the marina. The resort owners would need to apply to GBRMPA for Marine Park permission. The application would be subject to usual GBRMPA assessment processes.
- The owners of a sewage treatment facility do not require EPBC approval to discharge sewage into the Marine Park, because the facility was operational before the EPBC Act came into effect in 1999. The outfall is located in the Marine Park. The Marine Park permission is about to expire and requires a continuation application.
  - If there is no proposal to change operations or discharge parameters. The facility owners would need to apply to GBRMPA for Marine Park permission, and the application would be subject to the normal GBRMPA assessment processes.
  - If there is a proposal to substantially increase the amount of sewage to be discharged. This may require referral under the EPBC Act. As it would also require GBRMPA permission, the referral would result in a deemed application for GBRMPA.

## Application / Referral stage

### EPBC Act referrals

15. A proponent must refer a proposed action, under the EPBC Act, if they believe the action may have a significant impact on MNES. If the action is not likely to have a significant impact, a proponent may refer the action to obtain legal certainty that the action does not require assessment and approval under the EPBC Act to proceed.
16. The Minister or delegate will determine whether the action that is the subject of the referral requires assessment and approval under the EPBC Act.
  - a. Any action that requires assessment and approval is called a controlled action.
  - b. When the Minister or delegate decides that an action is a controlled action, the Minister or delegate must also decide on an assessment approach which is appropriate for the nature and scale of the action.
17. If GBRMPA is aware a proposed action may significantly impact the Marine Park and has not already been referred to the Minister under the EPBC Act, we may refer the action to the Minister. In practice this means a person applies to GBRMPA for permission and an initial review of the application suggests it may significantly impact on MNES:
  - a. In the first instance, GBRMPA discusses the proposal with the applicant and encourages the applicant to refer the proposal to the Minister under the EPBC Act.
  - b. If the applicant fails to refer under the EPBC Act, GBRMPA refers the proposal to the Minister.

### Dealing with deemed applications for which the Department and GBRMPA both have responsibility

18. In most cases, the Department leads the referral process and manages engagement with the proponent. The Department engages with GBRMPA throughout the referral and application process, as agreed in the MoU (see Figure 1). The Department coordinates input from various Commonwealth agencies, including GBRMPA, and communicates information between the proponent and these agencies. This provides a more consistent and streamlined process for the proponent.
19. GBRMPA provides input to the Department at key steps during the referral/application process
20. Once a referred action has become a deemed application for GBRMPA purposes, it remains as such until decisions are made by each agency, the application is withdrawn or the application is lapsed.

### Possible decisions at the EPBC referral stage

21. The Minister may decide that an action is: not a controlled action; not a controlled action if undertaken in a particular manner; a controlled action; clearly unacceptable or that the referral cannot be accepted due to the proposal being part of a larger action (see Figure 1).
22. If the Minister or delegate decides that an action is not a controlled action, or not a controlled action if undertaken in a particular manner, GBRMPA may then make a decision on the deemed application. If the EPBC Act decision is that the action is required to be undertaken in a particular manner so as not to be a controlled action, (in accordance with s77A of the EPBC Act) GBRMPA may provide advice to the Department on the provisions of the manner in which the action is to be taken prior to the EPBC Act decision being made. If GBRMPA then grants permission for the use of or entry into the Marine Park, the conditions of the permission should complement the EPBC Act particular manner provisions as much as possible, and should not be contradictory.
23. If the Minister determines that the action is a controlled action, it will undergo joint assessment as detailed later in this information sheet and Figure 2.
24. If the Minister determines the action will have clearly unacceptable impacts to one or more matters of national environmental significance, or that the referral cannot be accepted as it is part of a larger action, the deemed application is taken to be withdrawn pursuant to regulation 88C of the Regulations.

## Information Sheet – EPBC referral deemed application

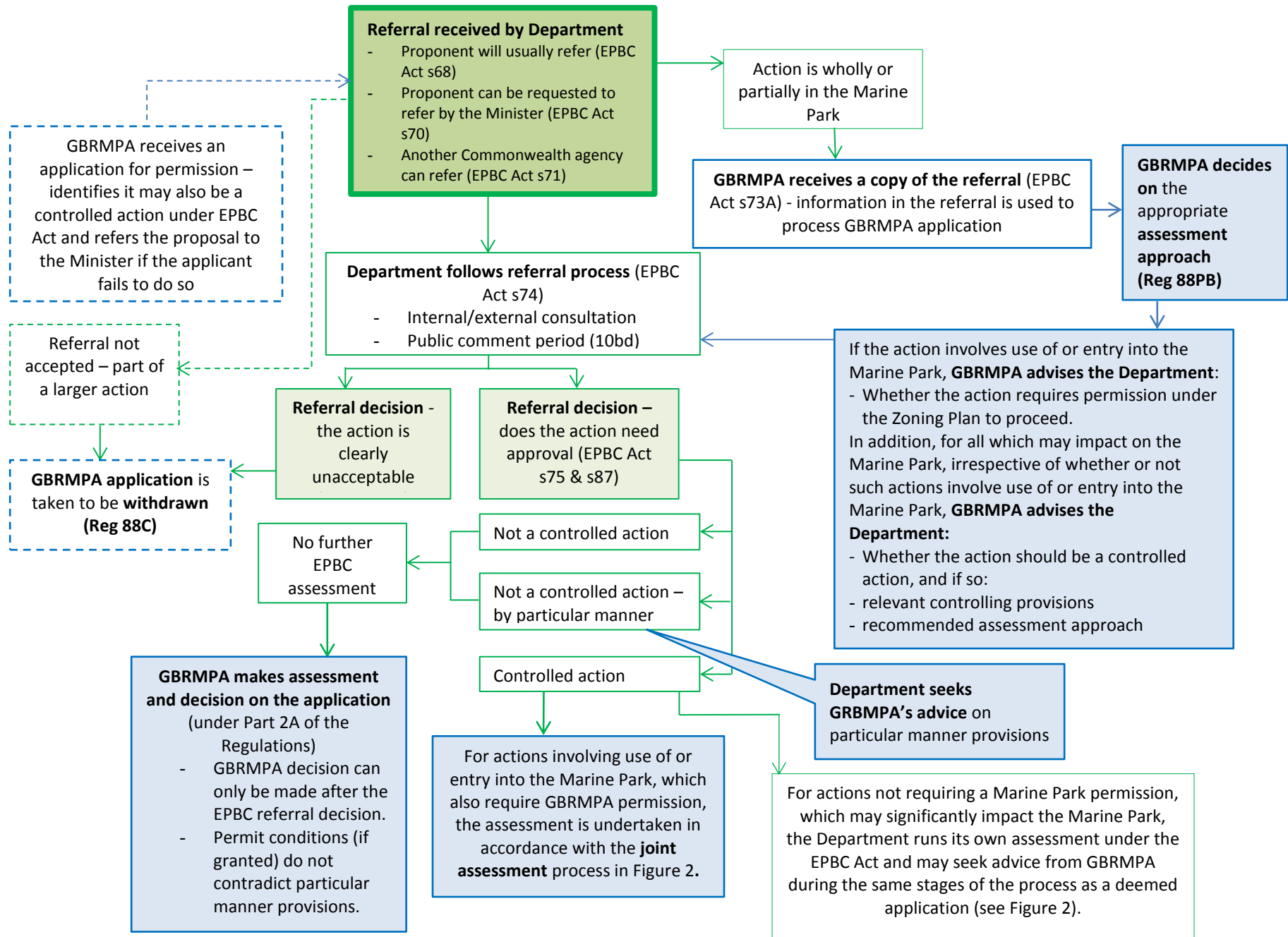


Figure 1. GBRMPA's involvement in the EPBC Act referral decision and subsequent requirements for the GBRMPA application

## Joint Assessment

25. Joint assessments are only conducted when a decision is made on an EPBC referral that the action is a controlled action.
26. In most cases, the Department leads the administration and assessment of deemed applications, engaging GBRMPA throughout the process as agreed in the MoU (see Figure 2). In some cases, GBRMPA leads the assessment following agreement with the Department at the time the action is determined to be a controlled action. This is particularly likely to be the case if the Marine Park is the only reason for the proposal being declared a controlled action or if the action is being proposed wholly within the Marine Park.
27. During key stages of any deemed assessment, GBRMPA will provide input to the Department to ensure that the issues relating to the Marine Park are adequately considered through the assessment (see Figure 2). As a minimum GBRMPA will provide input into:
  - a. The further information needed for assessment on Preliminary Documentation.
  - b. The content of the guidelines or terms of reference for the preparation of a public environment report or environmental impact statement.
    - a. The adequacy of the draft, supplementary and/or final assessment documents – GBRMPA provides advice as to whether the applicant has adequately considered the potential risks and impacts to the Marine Park in the assessment documentation and whether the information can be reasonably understood by the public.
    - b. The Department's assessment report – GBRMPA provides advice to the Department for inclusion in the assessment report, on issues specifically relating to the Marine Park.
  - c. The conditions for approval, if the action is proposed to be approved – GBRMPA suggests conditions to mitigate impacts to the values of the Marine Park.

## Queensland Assessment Bilateral Agreement

28. In December 2014, the Commonwealth and Queensland Government entered into the *Agreement between the Commonwealth of Australia and the State of Queensland relating to Environmental Assessment* (Assessment Bilateral Agreement) under section 45(4) of the EPBC Act. The [Assessment Bilateral Agreement](#) allows the Minister to rely on specified environmental impact assessment processes of the State of Queensland in assessing actions under the EPBC Act.
29. The Assessment Bilateral Agreement declares classes of proposed actions to be actions for which a Commonwealth-led assessment is not required, because the proposed action is adequately assessed under Queensland law. These classes of action are listed in Schedule 1 to the Assessment Bilateral Agreement.
30. The Minister may, however, determine that a particular action is not within one of those declared classes of action. This means that the Minister may determine that the action should be assessed under the EPBC Act, even though the Assessment Bilateral Agreement would normally apply. In these cases, the Department seeks advice from GBRMPA on whether the assessment bilateral should apply.
31. GBRMPA has no formal policy or agreement with the Queensland government explaining how assessments of actions that require a Marine Park permission will be conducted under the Assessment Bilateral agreement. However, the [Great Barrier Reef Intergovernmental Agreement 2015](#) sets out general principles that guide GBRMPA and Queensland in their joint management of the Marine Park.
32. GBRMPA may decide to conduct a joint assessment process (including public comment) with the Queensland Coordinator-General. A joint assessment process is generally favoured as it provides a smoother process for applicants. In a joint assessment process, the Queensland Coordinator-General usually leads the administration and engagement with the applicant. In addition GBRMPA is consulted throughout to ensure the requirements under the Regulations are also met. Joint and coordinated comments are provided to the applicant at key stages.

33. Any issues or differences in opinion between Queensland and GBRMPA are discussed early in the process, leading to a more comprehensive assessment and better harmonisation of conditions (if approval/permission is granted).
34. Regardless of whether the process is conducted jointly (coordinated by Queensland) or separately by GBRMPA and Queensland, GBRMPA will usually write its own assessment report, drawing from and building on the Queensland recommendation report.
35. After the Queensland Coordinator-General submits a recommendation report to the Minister, the Minister makes a decision under the EPBC Act. In doing so, the Minister may seek further input from GBRMPA.
36. Refer to the Decision stage section for how GBRMPA makes its decision after the Minister has made a decision under the EPBC Act.

### Decision stage

37. The Minister or Delegate must make a decision on whether to approve or refuse to approve the taking of a controlled action under the EPBC Act.
38. If EPBC Act approval is to be granted, the MoU provides the opportunity for GBRMPA to provide comments on proposed conditions for EPBC Act approval. The focus is on providing advice to the Department on the adequacy of conditions and their compatibility with conditions that GBRMPA may be considering.
39. Pursuant to regulation 88ZC of the Regulations, GBRMPA cannot make a decision on a deemed application unless:
  - a. the Minister has decided that the action is not a controlled action under section 75 of the EPBC Act.
  - b. the Minister has decided that an action is a controlled action – and the Minister has made a decision under section 133 of the EPBC Act to approve the taking of the action.
40. If the Minister refuses to approve the taking of an action (EPBC Act s133), then the Marine Park application is deemed withdrawn under regulation 88C.
41. If the Minister approves an action under the EPBC Act, GBRMPA must make a decision on the application within 10 business days, unless otherwise extended.
  - a. The decision period can be extended by GBRMPA one time only, for any length of time, under subregulation 88Z(4). This notice of extension must be given to the applicant before the decision timeframe of 10 business days expires.
  - b. Where the GBRMPA assessment process requires public comment to be sought, and public comment was not required to be sought under the EPBC Act (such as an assessment on referral information); or if only a short comment period was undertaken (such a preliminary documentation assessment); then GBRMPA may extend the decision making period to allow for public comment under the Regulations.
42. GBRMPA must consider any conditions placed on the EPBC Act approval under regulation 88Q(k) of the Regulations.
  - a. This information is used by GBRMPA when deciding whether to grant permission and if so, what conditions to place on the permission.
  - b. The conditions placed on the Marine Parks permission should provide for protection of the Marine Park values without duplicating, contradicting or potentially resulting in the contravention of EPBC approval conditions.
43. For all deemed applications, the decision under the Regulations is separate to the decision under the EPBC Act. It is legally possible for an application to be approved under the EPBC Act but refused under the Regulations. However, this rarely happens because:
  - a. The joint assessment process helps ensure that any GBRMPA issues are addressed in the recommendation made to the Minister about whether to approve an action under the EPBC Act.

## Information Sheet – EPBC referral deemed application

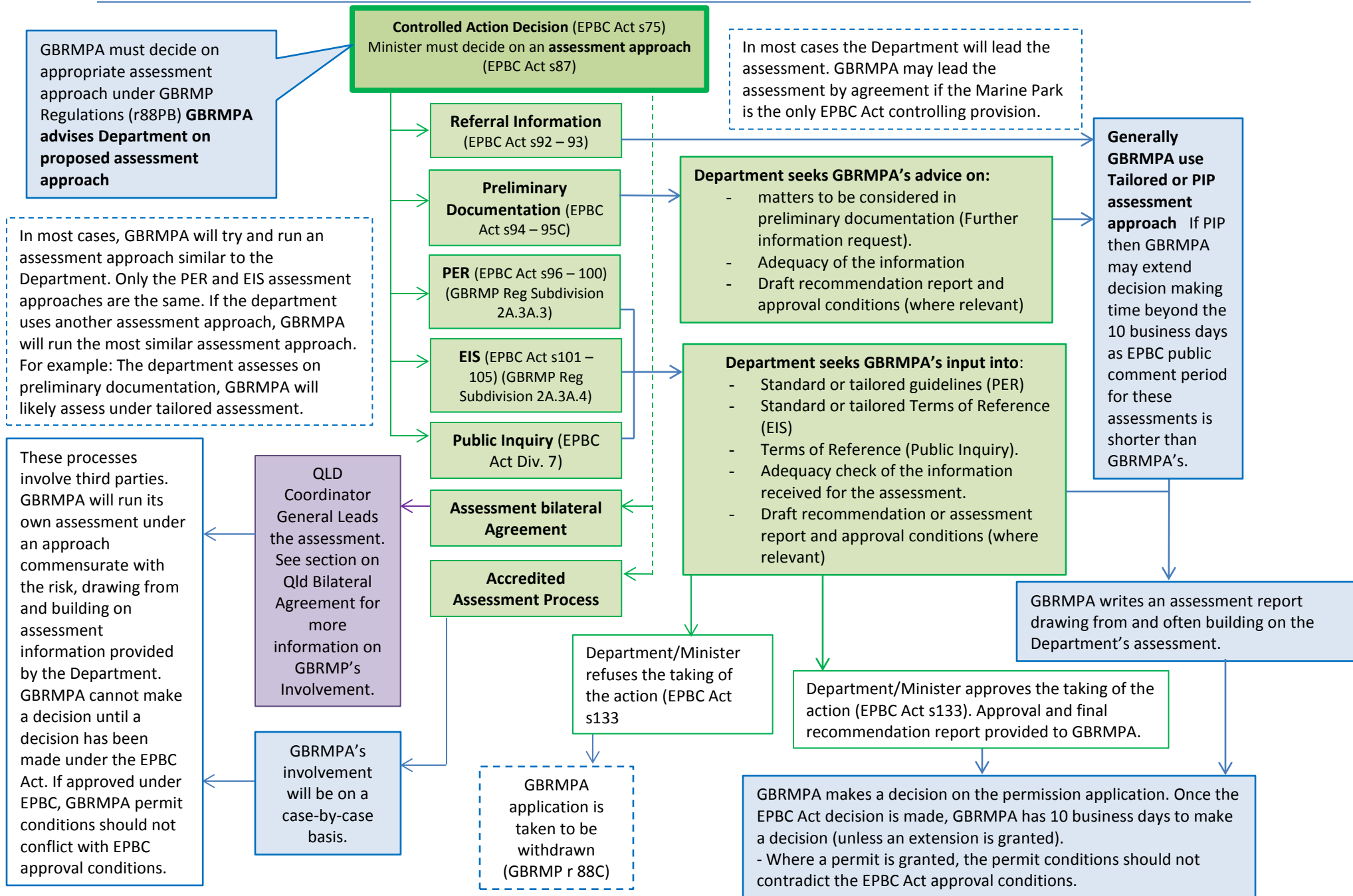


Figure 2. GBRMPA's involvement in the joint assessment under the MoU

- b. For controlled actions, paragraph 88Q(k) of the Regulations requires the GBRMPA decision-maker to consider the EPBC Act decision and relevant assessment documentation when making the GBRMPA decision (refer to [Assessment Guidelines](#) for more information).

### Lapsed or withdrawn applications

- 44. Under the EPBC Act, a proponent may withdraw their referral before the Minister has made a decision (under Part 9) to approve, or refuse to approve, the taking of the action. If an EPBC referral is withdrawn or a controlled action process lapses (under section 155 of the EPBC Act), then the Marine Park application is taken to be withdrawn under the Regulations (r88C). Fees already paid to GBRMPA are not refundable, however any further fees that are not yet due will not be charged.
- 45. Under Regulation 88C, a deemed application is taken to have been withdrawn for GBRMPA in these situations:
  - a. If the Minister decides under subsection 74A(1) of the EPBC Act not to accept the referral.
  - b. If the Minister decides under section 74B of the EPBC Act that the action is likely to have clearly unacceptable impacts.
  - c. If the Minister decides under section 133 of the EPBC Act to refuse to approve an action.
  - d. If the applicant requests a variation, under section 156A, to the extent that the application no longer includes a component requiring a Marine Parks permission, and the Minister grants that variation.
  - e. If the applicant notifies the Minister in writing that they are withdrawing the EPBC referral, under section 170C of the EPBC Act, and the referral is then withdrawn.
  - f. If the Minister declares that the application has lapsed under section 155 of the EPBC Act.
- 46. An application for Marine Park permission may lapse or be taken to have been withdrawn under the GBRMP Regulations. This happens:
  - a. Under regulation 88PP – If the applicant is required under Division 2A.3A to publish an advertisement inviting comment, and does not do so within the time required, the application is taken to be withdrawn at the end of that time.
  - b. Under regulation 88PQ – If the Authority required the applicant to take action in relation to an assessment process, and the applicant fails to do so within the designated timeframe the Authority may declare that the application is taken to have been withdrawn. Unless the applicant satisfies GBRMPA that the assessment should proceed in the absence of that action being taken (r88PQ(2)).
  - c. Under subregulation 88E (3) – if the applicant does not provide additional information requested by GBRMPA within the specified timeframe the application is taken to have been withdrawn. Note this is unlikely to occur with a deemed application, as information requests are coordinated by a single agency (usually the Department); or
  - d. Under Regulation 132 – if the applicant does not pay the correct fee for the application within the specified timeframe the application lapses.
- 47. If an application lapses or is taken to have been withdrawn under GBRMPA's legislation, the EPBC referral may remain active. If the applicant wishes to conduct activities in the Marine Park, they will need to make a new, stand-alone Marine Park permission application. This will be assessed by GBRMPA according to its usual processes (not as a deemed application).

### Post-permission decisions

- 48. For activities that require both GBRMPA permission and EPBC approval, the MoU establishes that both agencies will consult with the other prior to finalising any of these post-permission decisions:
  - a. transferring a permission/approval
  - b. varying conditions of a permission/approval
  - c. investigating potential non-compliance



- d. enforcing or prosecuting any potential non-compliance
- e. suspending, revoking or reinstating a permission/approval
- f. requiring an environmental compliance audit.

### Definitions

Refer to the [Permission System Policy](#) for a full list of permission system definitions

#### Controlled action

Has the meaning given in s 67 of the EPBC Act. Generally an action will be a controlled action if it is likely to have a significant impact on one or more matters of national environmental significance and therefore requires assessment and approval under the EPBC Act before the action can be taken.

#### EPBC referral deemed application

means a referral under the *Environment Protection and Biodiversity Conservation Act 1999* of a proposal to take an action that, under section 37AB of the *Great Barrier Reef Marine Park Act 1975*, is taken to be an application for a permission.

#### Department

The Australian Government department responsible for administration of the EPBC Act, currently the Department of the Environment and Energy.

#### Minister

The Australian Government Minister responsible for administering the EPBC Act currently the Minister for the Environment and Energy.

#### Proponent

A person who is designated as a proponent by the Minister under s 75 of the EPBC Act. This will generally be a person proposing to take an action that has been determined a controlled action under the EPBC Act.

#### Referral

A referral made pursuant to Division 1 of Part 7 of the EPBC Act. Essentially a referral is an application made under the EPBC Act for the Minister's consideration as to whether a proposed action is a controlled action.

### Further information

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