

Executive summary

Background

Under the *Ombudsman Act 2001* (Ombudsman Act), I have a dual role to investigate the administrative actions of Queensland public sector agencies and to assist those agencies to improve their decision-making and administrative practice. As part of my administrative improvement role, I have undertaken a series of own initiative investigations into the compliance practices of government regulators. My investigation of the Queensland Mines Inspectorate (QMI) within the Department of Mines and Energy (DME) is the latest such investigation.

While I had not received any complaints about the QMI, media and academic sources in Queensland and elsewhere have alleged in recent years that the QMI may not be adequately fulfilling its compliance roles under the *Coal Mining Safety and Health Act 1999* (Coal Act) and the *Mining and Quarrying Safety and Health Act 1999* (Mining and Quarrying Act), and that mine safety standards may be falling as a result.

I commenced an investigation on my own initiative³ into these matters. My investigation was conducted informally⁴ without exercising my coercive powers.⁵

Role of Ombudsman

In investigating the administrative actions of public sector agencies, the Ombudsman must consider whether those actions are (among other things):

- unlawful, unreasonable or unjust;
- taken on irrelevant grounds or having regard to irrelevant considerations;
- based wholly or partly on a mistake of law or fact; or
- wrong.⁶

The Ombudsman is empowered to make recommendations to the principal officer of an agency that action be taken to rectify the effect of maladministration or to improve administrative practice within that agency. The DME, as a Queensland Government department, is an 'agency' as defined in the Ombudsman Act.⁷ The QMI is an administrative unit of the DME.

³ Ombudsman Act, s.12(a)(iii)

⁴ Ombudsman Act, s.24(a)

⁵ Ombudsman Act, Part 4

⁶ Ombudsman Act, s.49(2)

⁷ Ombudsman Act, s.8(1)(a)

Public report

The Ombudsman Act provides that I may present a report to the Speaker for tabling in the Assembly, as I consider appropriate, on a matter arising from the performance of my functions. I have decided to report to Parliament on my investigation for the following reasons:

- mine safety is a matter of public interest;
- there has been criticism of the QMI in recent years in the media and from academics with expertise in mine safety;
- publication of this report will assist in informing the debate about the most effective means of improving regulatory practice in mine safety; and
- lessons from this report may be of benefit to other government regulators.

Principal objects of the investigation

The principal objects of the investigation were to:

- identify relevant practices and procedures;
- determine the extent to which QMI officers are complying with the practices and procedures;
- determine whether the practices and procedures are adequate;
- identify and recommend improvements to the practices and procedures; and
- if applicable, formulate proposals to amend legislation to enhance mine safety regulation.

Investigative process

My investigation was undertaken informally under s.24(a) of the Ombudsman Act, without the need to invoke my coercive powers.⁸ Staff of QMI (and DME more broadly) provided all information requested by my investigators and cooperated fully with the investigation.

During the investigation, my investigators recorded interviews with a number of senior QMI staff, and also held informal discussions with other persons, including representatives of unions, universities, industry associations and mine workers. Research undertaken for this investigation included a broad survey of literature on the topic of mine safety regulation, and regulatory best practice internationally.

My investigators conducted an audit of a sample of 35 of QMI's complaint and investigation files held in the Townsville, Rockhampton and Brisbane offices and also accompanied QMI inspectors on routine inspections of mine sites in north Queensland.

On 18 March 2008, I provided the Director-General of DME with a proposed report on my investigation. On 16 April 2008, I met with the Director-General, the Executive Director, Safety and Health and the Director, Legal Services to discuss the DME's response to my proposed report, and on 29 April 2008 I received a formal response from the Director-General.

⁸ Under part 4 of the Ombudsman Act

This process ensured that I complied with my statutory obligation to give the Director-General the opportunity to comment on the subject matter of the investigation.⁹

The Director-General advised me that he accepted 37 of my 43 recommendations and had reservations about the remainder.

I have extracted (or where necessary, summarised) the Director-General's response to my proposed report immediately following the relevant recommendations under the heading 'DME response'.

As provided by s.26(2) of the Ombudsman Act, the Minister for Mines and Energy, the Honourable Geoff Wilson MP, requested that I consult with him about the investigation. Accordingly, I met with the Minister on 8 May 2008. The Director-General was also present. At the meeting, the Minister indicated his general support for the investigation and the report and sought clarification of some of the proposed recommendations. I did not make any changes to the opinions and recommendations in the report as a result of this meeting, nor did the Minister ask me to do so.

Outcomes of the investigation

As a result of my investigation, I have concluded that, generally speaking, the administrative actions of DME relating to its compliance activities are reasonable, in accordance with the relevant legislation, and in accordance with DME's policies and procedures. However, I also concluded that there are deficiencies in certain aspects of DME's record keeping process. These are:

- a failure to record much of its informal compliance activity; and
- an inconsistency in the use, format and terminology of mine record entries.

I also concluded that much of the public criticism of the QMI stemmed from a perception that the Inspectorate has been 'captured' (that is, inappropriately influenced) by the mining industry.

I found that, while the evidence I obtained did not substantiate the criticism, the perception of 'capture' was not unreasonable having regard to the QMI's location within the DME, the QMI's reporting structure and its failure to record and publish details of much of its informal compliance activity.

I therefore made several recommendations for action to address this perception.

⁹ Ombudsman Act, s.26(3)

Opinions

I formed the following opinions:¹⁰

Opinion 1

The guidance provided by the QMI to its staff in relation to investigating deaths and serious injuries is reasonable and appropriate.

Opinion 2

The general standard of investigations and investigation reports by QMI inspectors meets their obligations under the Coal Act and the Mining and Quarrying Act.

Opinion 3

QMI's method of conducting investigations into mine-related deaths and serious injuries is reasonable and appropriate, and is in line with the objects of the Coal Act and the Mining and Quarrying Act.

Opinion 4

My investigation did not indicate that unreasonable delays are occurring in the production of investigation reports.

Opinion 5

While the QMI's inspectors frequently advise operators that mine inspections are to take place, the evidence does not support the opinion that this is being done to favour particular operators or that it is reducing the effectiveness of the inspections program.

Opinion 6

The QMI's failure to record much of its informal compliance activity constitutes unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

¹⁰ For the purposes of part 6, division 1 of the Ombudsman Act

Opinion 7

The extent of inconsistency in the use, format and terminology of mine record entries constitutes unreasonable administrative action within the meaning of s.49(2)(b) of the Ombudsman Act.

Opinion 8

The low level of prosecution activity by the QMI for breaches of the Coal Act and the Mining and Quarrying Act since the Acts commenced in 2001 does not, in itself, provide sufficient evidence of unreasonable administrative action within the meaning of the Ombudsman Act.

Opinion 9

My investigation did not establish that the QMI is inappropriately influenced by the mining industry in the performance of its functions.

Opinion 10

There is a reasonable perception that the QMI is subject to inappropriate influence from the mining industry and from officers in the DME responsible for promoting and supporting mining in Queensland. The main reasons for the perception are:

- its compliance practices, especially the preference for informal compliance options, which are not recorded in a way that can be publicly reported on;
- regional factors, leading to the development of social relationships and reliance on mine operators' hospitality; and
- staffing issues, including a high degree of mobility between the QMI and the mining industry.

Opinion 11

The QMI's practice of not recording and reporting on a significant part of its informal compliance activity means that it has a limited capacity to defend itself from allegations that it is too close to the mining industry and is not effectively regulating the industry.

Recommendations

I formed the following recommendations:¹¹

Recommendation 1

That the QMI and WorkCover establish a memorandum of understanding, or similar arrangement, to enable QMI to obtain from WorkCover de-identified reports of mine-related injuries.

Recommendation 2

That a proposal be prepared for the Minister that the Coal Act and the Mining and Quarrying Act be amended to require the QMI to investigate, as soon as practicable, any incident at a mine resulting in serious injury to a person where there is a reasonable possibility that the injury will lead to the person's death.

Recommendation 3

That the QMI develop and implement a policy whereby it takes primary responsibility for the investigation of:

- incidents at mines resulting in serious injury; and
- high potential incidents.

Recommendation 4

That the QMI provide guidance to inspectors on the application of the policy referred to in recommendation 3.

Recommendation 5

That where the QMI investigates an incident at a mine resulting in death or serious injury or a high potential incident, the Investigation Coordinator for the region or another appropriately qualified person (for example, a legal officer) participate in the investigation (at least initially) and report to the Executive Director and the relevant Chief Inspector of Mines on:

- whether the investigation is likely to result in prosecution action; or
- if it is too early to make that assessment, the action that needs to be taken before such an assessment can be made.

¹¹ Under s.50 of the Ombudsman Act

Recommendation 6

That the QMI implement a procedure whereby, if an investigation has continued for a specified period (say, six months) and an assessment has still not been made about whether it will be likely to lead to prosecution action, the matter is 'fast-tracked' to ensure that the period in which a prosecution may commence does not expire.

Recommendation 7

That, during the current accreditation period, the QMI review the content of relevant units of competency in its Diploma and Advanced Diploma courses, in light of the comments in this report about the need, in certain instances, to provide reports on investigations, or on the outcomes of investigations, to non-technical audiences.

Recommendation 8

That a proposal be prepared for the Minister that the Coal Act and the Mining and Quarrying Act be amended to authorise the QMI to publish the following information (except when to do so may prejudice potential prosecution action):

- its investigation reports into serious incidents in mines; and
- such details of its other compliance activities (including the issuing of directives to operators) as it considers appropriate for promoting safety in mines.

Recommendation 9

That the QMI standardise its risk-based inspection prioritisation system.

Recommendation 10

That the QMI significantly expand its use of team-based auditing activities with priority to be given to higher-risk operations, whether through the *SafeGuard* audit program, or other means.

Recommendation 11

That the QMI provide guidelines to its inspectors on the types of situations in which it is appropriate or inappropriate to warn mine operators of proposed site inspections.

Recommendation 12

That the QMI publish guidelines on how inspectors are to conduct themselves on visits to sites, with particular reference to the extent of their social interaction with staff of remote mining operations (whether at the mine or elsewhere).

Recommendation 13

That the QMI give greater emphasis to auditing the standard of the health and safety systems of contractors providing services to mine operators, with particular regard to how well those systems are being integrated into those of mine operators.

Recommendation 14

That the QMI publish a policy providing guidance to its inspectors, the industry and other stakeholders on its approach to its inspectors providing advice to mine operators and the limits of such advice.

Recommendation 15

That the DME take steps to publicise the existence of its system of confidential complaint and incident reporting and promote its use, and publish information on how information received via the system will be handled.

Recommendation 16

That the DME report publicly on complaints it receives about mine safety, including the number and type, how they were received and the broad outcomes.

Recommendation 17

That the DME proceed with proposed amendments to the Coal Act and the Mining and Quarrying Act to make it an offence for a person to cause, or attempt to cause, detriment to another person because anybody has provided, may provide or is believed to have provided information to the QMI, another government agency, or the mine operator itself about a mine safety concern.

Recommendation 18

That the commission of any offence of a kind described in recommendation 17 be recorded by the QMI on its database as a safety risk factor for the relevant mining operation.

Recommendation 19

That the QMI develop a policy providing guidance to its inspectors on the making and use of mine entry records including:

- the types of compliance actions to be recorded; and
- the format and terminology to be used in such records.

Recommendation 20

That the QMI develop, and require inspectors to use, standard terminology for all available compliance actions.

Recommendation 21

That, as part of its induction for all new inspectors, QMI ensure staff are trained in the appropriate use of mine record entries.

Recommendation 22

That the QMI upgrade its Lotus Notes database to enable more accurate and standardised recording of requests for action below the level of directives.

Recommendation 23

That the DME report publicly on the number and types of directives, substandard condition or practice notices, and other requests for action issued by its inspectors.

Recommendation 24

That the DME require inspectors to specify a due date for implementation of each request for action the subject of a mine record entry.

Recommendation 25

That when an inspector specifies a due date for implementation of a directive or request for action, the inspector consider whether the level of risk is acceptable during the specified implementation periods.

Recommendation 26

That the DME implement a policy to the effect that, where an inspector makes a request for action to an operator to address a safety risk that could have been addressed by way of a directive, the inspector provide reasons in the mine record entry for not issuing a directive.

Recommendation 27

That, for the purpose of developing the policies I have recommended, the QMI review a sample of mine record entries (including some relating to directives) and incident investigations from all three regions and all sectors of the industry, and analyse:

- the nature, circumstances and appropriateness of the directives, requests for action and advice given;
- whether any request for action or advice should have been the subject of a directive;
- the clarity and practicability of each directive, request for action or advice; and
- whether due dates for compliance were specified and followed up.

Recommendation 28

That mine record entries produced by QMI inspectors be randomly and regularly audited by head office to identify whether:

- they are being made and recorded appropriately;
- directives were given wherever appropriate;
- due dates for compliance were specified and followed up; and
- risk is being adequately addressed in mine record entries.

Recommendation 29

That a proposal be developed for the Minister to consider amendments to the Coal Act and the Mining and Quarrying Act to authorise the Executive Director, Safety and Health, to commence prosecutions under those Acts.

Recommendation 30

That until the amendments recommended in recommendation 29 are made and commence, the Director-General of DME delegate the authority to commence prosecution action under the Coal Act and the Mining and Quarrying Act to the Executive Director, Safety and Health.

Recommendation 31

That if it is proposed to continue using review committees to advise on possible prosecution action, DME's Compliance Policy be amended to ensure no member of the Committee, whether an officer of the public sector or not, is involved in promoting the mining industry in Queensland.

Recommendation 32

That the QMI amend its Compliance Policy to provide that, when determining how to respond to an unacceptable level of risk at a mine, it will have regard to the following priorities:

1. Prevention of immediate harm at the site;
2. Prevention of similar incidents occurring at that site or elsewhere in the industry; and
3. The taking of prosecution action in respect of serious or repeated safety breaches.

Recommendation 33

That the QMI refine its Compliance Policy to provide greater guidance to officers on the appropriate compliance options to use to address safety concerns in the various sectors of the mining industry (such as small quarries).

Recommendation 34

That the QMI revise its Compliance Policy to incorporate, in an appropriately modified form, the principles set out in the Macrory Report.

Recommendation 35

That the DME undertake research (preferably in collaboration with the mining industry, unions, universities, other inspectorates and other relevant bodies) on the effectiveness of the various types of compliance action in improving mine safety.

Recommendation 36

That the DME use the results of this research in developing a new Compliance Policy and regulatory strategy.

Recommendation 37

That the DME develop a proposal for the Minister's consideration to amend the Coal Act and the Mining and Quarrying Act, and other relevant Acts, to provide for a wider range of compliance tools.

Recommendation 38

That the QMI conduct an audit to identify areas of its operational activity susceptible to inappropriate influence from the mining industry, based on the indicators discussed in this chapter, and develop strategies to manage the associated risks.

Recommendation 39

That the position of Commissioner for Mine Safety be established by legislation to advise the Minister on mine safety matters, chair the Coal Mining Safety and Health Advisory Council and the Mining Safety and Health Advisory Council and to report to Parliament on the performance of the QMI.

Recommendation 40

That the Executive Director, Safety and Health, be empowered to report directly to the Minister on mine safety issues.

Recommendation 41

That a proposal be developed for the Minister to give legislative recognition to the existence and role of the QMI and to recognise its operational independence.

Recommendation 42

That the DME estimate the cost of implementing the recommendations I have made in this report and prepare a submission for the Minister's consideration for increased funding for the QMI to enable it to discharge the additional responsibilities I have recommended.

Recommendation 43

That the DME increase the public visibility of its general complaints management system.

Recommendation 44

That the DME appoint an officer within the department for the coordination of its complaint handling function.