



# REPORT OF THE INTEGRITY COMMISSION

NO. 1 OF 2021 / 24 AUGUST 2021

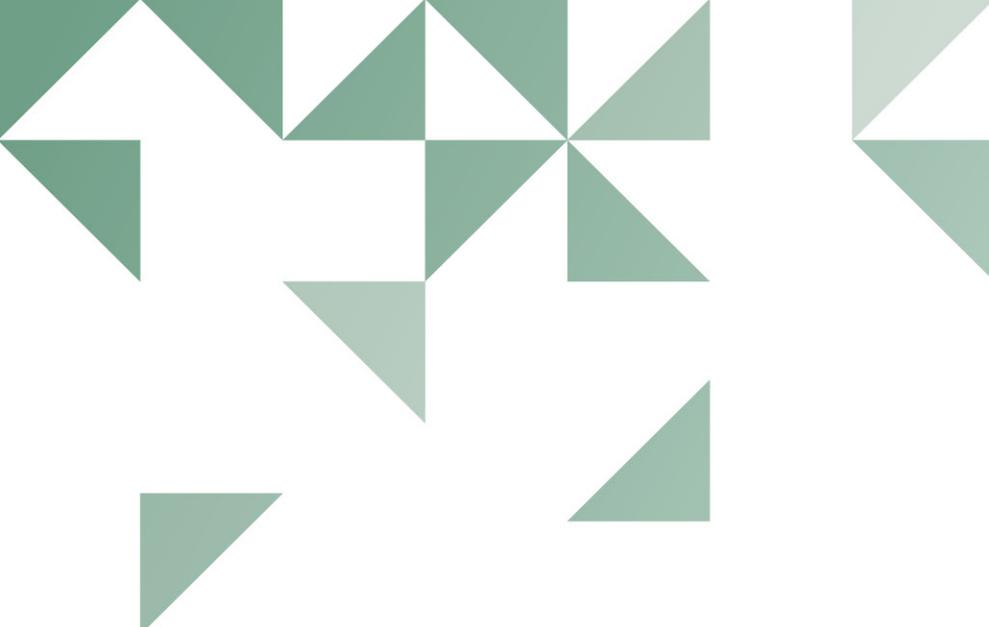
Summary of an investigation into allegations of  
misconduct by the Work Health and Safety  
Regulator, Government Ministers and ministerial staff



INTEGRITY  
COMMISSION  

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TASMANIA



The objectives of the Integrity Commission are to –

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania;
- enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

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This report and further information about the Commission can be found on the website [www.integrity.tas.gov.au](http://www.integrity.tas.gov.au)

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24 August 2021

President  
Legislative Council  
Parliament House  
HOBART TAS 7000

Speaker  
House of Assembly  
Parliament House  
HOBART TAS 7000

Dear Mr President,

Dear Mr Speaker,

In accordance with s 11(3) of the *Integrity Commission Act 2009*, the Integrity Commission presents *Report 1 of 2021* to Parliament, a summary of an investigation into allegations of misconduct by the Work Health and Safety Regulator, Government Ministers and ministerial staff.

Yours sincerely,

Aziz Gregory Melick AO SC  
**Chief Commissioner**  
**On behalf of the Board**

Michael Easton  
**Chief Executive Officer**

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## EXECUTIVE SUMMARY

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This is a summary report of an investigation by the Integrity Commission Tasmania of the circumstances surrounding the serving of a prohibition notice on the Bob Brown Foundation, by the Work Health and Safety Regulator.

The Work Health and Safety Regulator is a statutory role, independent of the executive government. The Regulator works with WorkSafe Tasmania to oversee the state's work health and safety.

In early 2020, the then Regulator, Mark Cocker, served a wide-ranging prohibition notice on a not-for-profit group protesting forestry activity, the Bob Brown Foundation. The notice required the Foundation to cease protest activity throughout Tasmania.

The nature of the notice, and public commentary and actions, led to perceptions that the Regulator had not acted with independence from the Government. Two complaints were made to the Commission, triggering an investigation.

The investigation covered a number of high misconduct risk areas, including contact between a lobbyist, Government and statutory officers.

The Integrity Commission has found that, regardless of whether it was the best decision, there were legal and proper motives for the notice served on the Foundation. No Government member, or ministerial staffer, pressured the Regulator to serve the notice. However, by the time the notice was served, the Regulator had been the subject of sustained lobbying by a private citizen for nearly two years.

All public officers involved in this matter respected the roles of other public officers.

This report sets out the details of events, so that the public can see what occurred, and have confidence that the alleged misconduct has been appropriately investigated. It also serves as a lesson for public officers who may face similar circumstances in the future, to ensure that they conduct themselves with a similar level of respect for the independent roles of other public officers, and for their own office.

## PART A INTRODUCTION

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### 1. About the Integrity Commission

The Integrity Commission (the Commission) is an independent statutory authority established by the *Integrity Commission Act 2009* (Tas) (IC Act).

The Commission's objectives are to:

- A. improve the standard of conduct, propriety and ethics in public authorities in Tasmania
- B. enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with, and
- C. enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

The Commission accepts, and investigates, complaints of misconduct in the Tasmanian public sector. In each investigated complaint, we strive to identify systemic issues and misconduct risks. This helps public sector organisations to prevent future misconduct, and informs us in our educative work.

### 2. The complaints

On 20 February 2020, the then Work Health and Safety Regulator and Chief Executive Officer of WorkSafe Tasmania (WST), Mark Cocker, served a 'prohibition notice' on the Bob Brown Foundation. There were media reports, radio interviews and social media posts about the notice.

On 27 February 2020, Cassy O'Connor MP and Dr Rosalie Woodruff MP submitted a complaint to the Commission about the notice. They publicised that they had submitted the complaint.

On 5 March 2020, the Commission received another complaint about the notice. The complainant did not make this complaint public.

The Commission is aware of the concerns of some people that the Parliamentarians' complaint was 'politically motivated'. The Commission assesses each complaint on its merits, and we operate only in accordance with our legislation. We only pursue complaints that may involve misconduct as defined in the *IC Act*. The motivations of the complainant are irrelevant to whether misconduct has occurred, and irrelevant to whether we pursue a complaint.

However, we have repeatedly and strongly discouraged MPs who have made a complaint to the Commission from publicising their complaint. It is more challenging to investigate if the matter has been publicised. Unnecessary and unwarranted reputational damage often accompanies public statements. While we have an obligation to tell people about our work, our approach is to do so when we have something substantive to say, not when we are simply commencing an investigation. Our office should not be used for political point scoring in the media.

## Assessment

An Assessor was appointed to undertake an assessment of the complaints in accordance with the *IC Act*. The assessment involved obtaining some records, and the completion of an assessment report pursuant to the *IC Act*.

On receipt of the assessment report, on 30 March 2020 the Commission's then Chief Executive Officer, Richard Bingham, determined that the complaints be investigated by the Commission.

## 3. The investigation

This was not an investigation into whether the prohibition notice served on the Bob Brown Foundation was lawful. Instead, our focus was the conduct of various public officers. This primarily involved investigating whether there was:

- A. an improper use of power or failure to act independently by Mr Cocker, and
- B. any attempted improper influence over Mr Cocker by members of the Government or their staff.

### 3.1. Jurisdiction

One of the Commission's principal objectives is to investigate and deal with allegations of misconduct appropriately. In performing its functions and exercising its powers, the Commission may inform itself of any matter in such a manner as it thinks fit.

In this matter, our jurisdiction was invoked on receipt of a complaint on 27 February 2020, and then on 5 March 2020, alleging that designated public officers had committed misconduct ('designated public officers' are defined in section 6 of the *IC Act*).

During any investigation, the investigator may make any investigations they consider appropriate, conduct the investigation in any lawful manner they consider appropriate, and obtain information from any person in any lawful manner they deem appropriate, under section 46 of the *IC Act*.

The conduct of the investigation was carried out in accordance with section 47 of the *IC Act*.

### 3.2. Allegations

Our investigators base their investigations around factual 'allegations'. As such, the allegations:

- A. may not necessarily align with the contents of the complaint, and
- B. may change over the course of the investigation, on the basis of evidence received.

We align the factual allegations with the relevant parts of the definition of misconduct in the *IC Act*.

The investigator makes factual findings only. They do not make misconduct findings. Only an Integrity Tribunal has the power to make misconduct findings under the *IC Act*. An Integrity Tribunal is a tribunal convened after an investigation. There has been no Integrity Tribunal established for this matter.

A substantiated factual allegation does not necessarily mean that misconduct has occurred, as there may be mitigating factors.

The investigator determined that the allegations are those set out in the table below.

#	Factual allegation	Possible misconduct
1	Mark Cocker improperly used his role as Regulator to take action against the Bob Brown Foundation Inc.	The performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper (s 4(1)(a)(ii) of the <i>IC Act</i> ).
2	Mark Cocker's handling of alleged Bob Brown Foundation safety issues lacked independence.	A breach of a code of conduct applicable to the public officer: <i>State Service Act 2000</i> (Tas) s 9(14): An employee must at all times behave in a way that does not adversely affect the integrity and good reputation of the State Service (s 4(1)(a)(i) of the <i>IC Act</i> ).
3	The Hon Elise Archer MP exercised, or attempted to exercise, undue influence over the Regulator in relation to the Bob Brown Foundation in 2019-20.	The performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper (s 4(1)(a)(ii) of the <i>IC Act</i> ).
4	The Hon Guy Barnett MP exercised, or attempted to exercise, undue influence over the Regulator in relation to the Bob Brown Foundation in 2018-2020.	The performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper (s 4(1)(a)(ii) of the <i>IC Act</i> ).
5	The Hon Will Hodgman MP exercised, or attempted to exercise, undue influence over the Regulator in relation to the Bob Brown Foundation in 2018.	The performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper (s 4(1)(a)(ii) of the <i>IC Act</i> ).
6	In 2018 - 2020, ministerial staff failed to respect the Regulator's independence.	The performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper (s 4(1)(a)(ii) of the <i>IC Act</i> ).

### 3.3. Obtaining information

The Assessor and then the Investigator used the power to serve coercive notices to obtain information under section 47 of the *IC Act* throughout the assessment and investigation. All notices were subject to the strict confidentiality provisions set out in section 98 of the *IC Act*.

The 17 coercive notices included:

- A. four notices to provide statutory declarations in answer to listed questions, served pursuant to section 47(1)(a) of the *IC Act* on:
  - i. two senior State servants
  - ii. Attorney-General the Hon Elise Archer MP, and
  - iii. a former ministerial staff member.
- B. three notices to attend and give evidence served pursuant to section 47(1)(b) of the *IC Act* on:
  - i. the current *Work Health and Safety Act 2012* Regulator and WST Executive Director (who was then Acting Regulator and Chief Executive Officer, and in early 2020 was Director Industry Safety)
  - ii. another senior WST employee, and
  - iii. Mr Cocker.
- C. 10 notices to produce records served pursuant to section 47(1)(c) of the *IC Act*.

### 3.4. Standard of proof

The standard of proof applied in this report to factual findings is the civil standard i.e. ‘on the balance of probabilities’. This requires only ‘reasonable satisfaction’, as opposed to ‘satisfaction beyond reasonable doubt’ (as is required in criminal matters).

In considering whether the civil standard of proof has been met, an investigator will bear in mind what was said in *Briginshaw v Briginshaw*:

*Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

*[(1938) 60 CLR 336, 362 (Dixon J)].*

### 3.5. Procedural fairness

In accordance with section 46(1)(c) of the *IC Act*, the Investigator ‘must observe the rules of procedural fairness’ in undertaking the investigation. Procedural fairness means that fair procedures have been followed in making findings.

This report contains factual findings. Where factual findings might be considered to be adverse, they were provided to the affected individuals for comment prior to finalisation of the report, and their comments taken into account in finalising the report.

## PART B FACTUAL BACKGROUND

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### 4. Key people and organisations

#### WorkSafe Tasmania

**WorkSafe Tasmania** (WST) is Tasmania’s work health and safety oversight body. The *Work Health and Safety Act 2012* (WHS Act) governs WST. Administratively, WST is part of the Department of Justice in the Tasmanian State Service.

WorkSafe Tasmania is led by a Chief Executive Officer (now known as the Executive Director), who is usually also **the Regulator** under the *WHS Act*. The Regulator has various statutory functions. It is implicit in the *WHS Act* that the Regulator’s decisions must be independent and free from the influence of both government and other stakeholders such as industry. A Minister cannot direct the Regulator to take action under the *WHS Act*. Moreover, the Regulator must make their decisions in accordance with the *WHS Act*, and not for any other reason or purpose, such as political gain or pressure from stakeholders.

#### Mark Cocker

**Mark Cocker** was the WST CEO and Regulator between 2018 and 2020. Mr Cocker resigned from his position on 26 March 2020.

At all relevant times, WorkSafe Tasmania was in the Building and Construction ministerial portfolio. The two relevant holders of that portfolio for the purposes of this investigation were the Hon **Guy Barnett** MP (in 2018), and Attorney-General the Hon **Elise Archer** MP (in 2020).

#### Bob Brown Foundation

The **Bob Brown Foundation** (the Foundation or BBF) is a non-profit environmental fund. Its website states that it aims ‘to help campaigns and activists who show real pluck and intelligence in protecting ecosystems, species and wild and scenic heritage’. The Foundation arranges protests at forestry sites across Tasmania.

#### Kelly Wilton

**Kelly Wilton** is a private citizen. She is the leading advocate of an informal group called **Support Tassie’s Timber People**. The group has a social media presence, primarily operated by Ms Wilton. Ms Wilton has been an ongoing critic of the Foundation’s protest activity, as well as the response of authorities – including WST – to this activity. This report refers to Ms Wilton as a ‘lobbyist’, and to her activities as ‘lobbying’. However, Ms Wilton is not paid for the work she does, and is not on the Register of Lobbyists.

## State Government

The current Government portrays itself as a strong supporter of the forestry industry. The forestry industry in Tasmania includes government business enterprise **Sustainable Timber Tasmania** (STT), and private operators such as **Britton Timbers**.

## 5. Timeline of events

The investigation found that the events of 2020 were the culmination of a series of communications that began in 2018. As a result, this report covers the period 2018 to 2020. It considers conduct that occurred in both 2018 and 2020.

## PART C ANALYSIS AND FINDINGS

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### 6. The events of 2018

#### 6.1. Lobbying of the Government and the Regulator

##### The Regulator

From 29 April 2018, Kelly Wilton regularly and frequently wrote directly to Mark Cocker about alleged safety issues at BBF protests. She often copied Ministers and their staff into these emails. In her emails, Ms Wilton provided documentary evidence, including photographs, and observations about alleged safety breaches of the *WHS Act* by the BBF.

Initially WST staff, supported by Mr Cocker, considered that Ms Wilton's communications were not 'notifiable incidents' under the *WHS Act*. WST saw Ms Wilton's communications as an attempt to attack the BBF through the *WHS Act*. WST did not take any formal action under the *WHS Act*.

As mentioned above, Ms Wilton regularly copied Ministers and their staff into her emails. There is no evidence that Ms Wilton was encouraged to do so. It is not unusual for constituents to copy Government members into emails.

##### The Government

Also from April 2018, Ms Wilton raised safety concerns about the BBF directly with STT, Minister Guy Barnett, and then Premier Will Hodgman.

Ms Wilton's continued lobbying of Ministers about the BBF caused them to request updates from Mr Cocker. These requests were sometimes through the Department of Justice, and sometimes direct to WST.

Ms Wilton characterised her continued contact with Ministers as 'challenging the decision' of WST not to take formal action.

##### *Minister Barnett*

In April 2018, Minister Barnett's office raised Ms Wilton's concerns with WST, placing it on the agenda for its next meeting with WST. Mr Cocker said that this was not unusual.

There is evidence that Minister Barnett and his staff saw some political benefit in maintaining a good relationship with Ms Wilton. Ms Wilton appears to have felt that the Government was engaged with, and interested in, her concerns.

However, Minister Barnett’s multiple requested updates from WST do not reflect a heightened or growing interest in BBF activities, or an attempt to influence Mr Cocker. Rather, they were a reflection of the persistence of Ms Wilton and her ongoing communication with Minister Barnett on this issue, which in turn led to regular contact with Mr Cocker.

Mr Cocker and other WST staff regularly drafted Minister Barnett’s communications with Ms Wilton. It is normal practice for departmental staff to draft responses to correspondence on behalf of Ministers. The following of this process indicates that Minister Barnett and his staff were not attempting to influence Mr Cocker’s decisions.

In June 2018, Minister Barnett explained in writing to Ms Wilton that the Regulator is independent, and that the issues she raised were matters for Mr Cocker to consider. Minister Barnett was guided by WST in how he responded to her. This is an appropriate and proper response.

At times in 2018, Ms Wilton documented that she felt she had not been supported by Minister Barnett.

### *Former Premier Hodgman*

In June and July 2018, there was contact between the Premier’s office and Ms Wilton. This followed a talkback interview on ABC Radio with then Premier, Mr Hodgman. Despite claims by Ms Wilton to the contrary following this contact, no member of the Government, including Mr Hodgman, formally referred any of Ms Wilton’s concerns to WST.

Ms Wilton wrote that Mr Hodgman ‘interjected’ with Mr Cocker on her behalf. This was not supported by any other evidence, and is incorrect.

A letter sent by Mr Hodgman to Ms Wilton about her concerns was prepared with the assistance of WST. This is not indicative of attempted undue influence.

Following continued contact from Ms Wilton, staff from Mr Hodgman’s office sought updates about WST’s responses to her. Like the requests from Minister Barnett, these requests were made to facilitate informed responses to Ms Wilton. Mr Hodgman had no contact with Mr Cocker.

## **6.2. ‘Service’ of a notice on the BBF**

On 24 September 2018, Mr Cocker signed a letter and a *WHS Act* section 155 notice, to be served on the BBF. Addressed to the CEO of the BBF, the notice sought ‘information relevant to the safety of workers and other persons in workplaces occupied by or under the control of the Foundation, including by its officers, workers and or others’.

The Regulator can serve a section 155 notice if the Regulator has reasonable grounds to believe that a person can give information, provide documents or give evidence concerning a possible contravention of the Act, or assist the Regulator in monitoring or enforcing compliance with the Act. Non-compliance with a notice can result in a fine of up to \$50,000.

The notice did not have the potential to interfere with or undermine BBF operations. The notice only required the BBF to produce information.

The BBF did not receive the notice. It had no knowledge of the notice until 2020. When the BBF did not respond to the notice, the usual course would have been for Mr Cocker and WST to follow-up. This did not occur.

After it was drafted, nothing happened in relation to the notice until 2020, apart from two instances:

1. on 25 September 2018, Mr Cocker advised Ms Wilton about the existence of the notice, and
2. on 19 October 2018, Ms Wilton followed up about the notice. Mr Cocker assured her that he ‘personally [has] carriage of your file and everything is in order’.

It was not unlawful for Mr Cocker to tell Ms Wilton about the notice. The evidence suggests he did so as a means to manage a persistent complainant. However, it was unnecessary. Both the current Regulator (who was at that time WST Director Industry Safety) and another senior WST employee told the Commission that they would not have acted in this way.

There is no evidence that any members of the Government, including Minister Barnett, the former Premier or their staff, were aware of the notice.

## Grounds for the notice

Mr Cocker said that the information about the BBF protest activity ‘as a whole’ prompted him to issue the notice, and that it was motivated by safety concerns.

Other documentary evidence from that time supports Mr Cocker’s evidence. Records indicate that it was the information itself, not the party providing it or the regular update requests from Government, that led Mr Cocker to issue the notice.

That the information about alleged dangerous activity came from Ms Wilton, and was raised in the media and in Parliament, does not invalidate that information. Regardless of Ms Wilton’s motivations, her ongoing communications to WST – directly and via Parliamentarians – raised genuine safety issues for Mr Cocker to consider.

The information requested in the notice was about safety issues. In the circumstances, Mr Cocker’s belief that the BBF was capable of providing the information presents as a reasonable one. The information requested would have assisted Mr Cocker to monitor the BBF’s compliance with the *WHS Act*. Mr Cocker also gave evidence that the notice was part of changes he was attempting to make to internal processes at WST.

Yet Mr Cocker’s failure to realise that there had been no response to the notice undermines its validity. It raises questions about whether the notice was required. Evidence indicates this failure was due to internal factors in WST at the time. These factors included the nature of Mr Cocker’s interactions with his WST colleagues, a heavy workload and inadequate systems. The evidence indicates that there was a degree of internal dysfunction in WST.

WST personnel told the Commission that Mr Cocker regularly chose to make decisions and exercise his functions in isolation, without involving his staff. It is unfortunate that the only staff who were aware of the existence of the notice were Mr Cocker himself and another employee who left WST at the end of 2018.

Mr Cocker's failure to follow-up on the notice was exacerbated when he assured Ms Wilton in writing that 'everything was in order', which was clearly not the case.

### **6.3. Conclusion**

There is evidence of frequent contact between Ms Wilton, Government members and Mr Cocker about alleged safety issues at BBF protests in 2018.

There is nothing improper in the Government maintaining good relations with community members who support its policy position. It is up to statutory officers such as the Regulator and Government members to ensure that persistent lobbying does not result in undue influence or biased decision making.

There is no evidence that Minister Barnett and his staff, directly or indirectly, attempted to pressure or influence Mr Cocker to take action in 2018. Similarly, there is no evidence that Mr Hodgman and his staff, directly or indirectly, attempted to pressure or influence Mr Cocker to take action in 2018.

Further, the decision to draft the section 155 notice was Mr Cocker's alone. The information supplied by Ms Wilton throughout 2018 gave rise to reasonable grounds for Mr Cocker to draft the notice. The weight of evidence indicates that the fact it was not pursued was not because the notice was not valid, but rather internal dysfunction at WST and in Mr Cocker's decision-making.

Finally, it may have been an act of poor judgement for Mr Cocker to inform Ms Wilton about the notice. However, this act was not so serious as to reach the threshold of potential misconduct.

## 6.4. Findings

### Findings

Allegation 1: Mark Cocker improperly used his role as Regulator to take action against the Bob Brown Foundation Inc.

**Mr Cocker’s decision to issue a section 155 notice was underpinned by his genuine and reasonably held belief that the BBF could provide him with information to assist him as Regulator to monitor BBF’s compliance with the *WHS Act*.**

**There is no evidence that Mr Cocker was influenced by requests for updates about Ms Wilton’s concerns by members of the Government when determining to issue a section 155 notice.**

**Mr Cocker did not improperly use his role as Regulator when issuing a section 155 notice on the BBF.**

Allegation 2: Mark Cocker’s handling of alleged Bob Brown Foundation safety issues lacked independence.

**Mr Cocker’s decision to issue a section 155 notice was underpinned by his genuine and reasonably held belief that the BBF could provide him with information to assist him as Regulator to monitor BBF’s compliance with the *WHS Act*.**

**There is no evidence that Mr Cocker was influenced by requests for updates about Ms Wilton’s concerns by members of the Government when determining to issue a section 155 notice .**

Allegation 4: The Hon Guy Barnett MP exercised, or attempted to exercise, undue influence over the Regulator in relation to the Bob Brown Foundation in 2018-2020.

**There is no evidence that Mr Cocker was influenced by requests for updates about Ms Wilton’s concerns by members of the Government when determining to issue a section 155 notice.**

**Minister Barnett did not attempt to exercise undue influence over the Regulator in relation to the issuing of a section 155 notice.**

Allegation 5: The Hon Will Hodgman MP exercised, or attempted to exercise, undue influence over the Regulator in relation to the Bob Brown Foundation in 2018.

**There is no evidence that Mr Cocker was influenced by requests for updates about Ms Wilton’s concerns by members of the Government when determining to issue a section 155 notice.**

**Former Premier Hodgman did not attempt to exercise undue influence over the Regulator in relation to the issuing of a prohibition notice.**

Allegation 6: In 2018 - 2020, ministerial staff failed to respect the Regulator’s independence.

**No ministerial staff failed to respect the Regulator’s independence in terms of action that could be taken by the Regulator in relation to the BBF and ongoing forestry protests, including in relation to the issuing of a section 155 notice.**

## 7. The events of 2020

### 7.1. Before service of the prohibition notice

Ms Wilton continued to contact WST about her concerns throughout 2019. Ms Wilton copied the relevant Government minister into some of her emails.

By early 2020, WST had received an abundance of information about allegedly dangerous protest activity by the BBF over an extended period. Nearly all of this information came from Ms Wilton.

Other than the unserved notice, WST had not contacted the BBF about these concerns. For a range of reasons, Mr Cocker's interest in the BBF protests was diverted from this issue between October 2018 and early 2020.

#### Formal notification to WST and worksite inspection

On 3 February 2020, BBF protest activity took place in the Tarkine near Que River at forestry coupe B0102A. This is a STT-managed coupe that provides specialist timber to Britton Timbers. Some protestors attached themselves to logging machinery, and some arrests occurred.

Ms Wilton submitted what she considered was a 'formal notification' to WST about the protest. However, as a private citizen, Ms Wilton did not have the ability under the *WHS Act* to make such a notification. She also contacted STT and Britton Timbers (and Government members), urging them to consider action under the *WHS Act*.

On 5 February 2020, Sustainable Timber Tasmania made a formal notification under the *WHS Act* to WST about a protest incident at the coupe that day. Britton Timbers also made complaints (but not notifications) about the BBF. These were the first submissions to WST about BBF protests by persons other than Ms Wilton.

Britton Timbers publicly expressed concern about the protest activity and said it had expectations of a robust response from WST. There was considerable media coverage of the protest activity. Government media releases criticising the BBF protests initiated some of this coverage.

The STT notification prompted Mr Cocker to initiate a worksite inspection of the coupe. WST staff conducted the inspection on 6 February 2020. During the inspection, the inspectors informed protestors that they were in breach of the *WHS Act*.

The evidence obtained from the inspection caused Mr Cocker to believe that dangerous activity was occurring at the worksite. The then WST Director Industry Safety (now Regulator) told the Commission that the inspection confirmed the activity was unsafe and necessitated WST action.

Mr Cocker said that, before the inspection, he had been forming a view that he might need to serve a prohibition notice on the BBF under section 195 of the *WHS Act*. Such a notice would have required the Foundation to halt the allegedly dangerous protest activity until it had mitigated the risks. The WST Director Industry Safety agreed that it was around this time that Mr Cocker began to consider a prohibition notice.

## 7 February 2020 – Meeting between Government and WST

The Building and Construction Minister, ministerial staff and departmental representatives, including the Regulator, have a regular fortnightly meeting (RFM). By February 2020, Attorney-General Elise Archer had replaced Minister Barnett as the Building and Construction Minister.

An RFM was held on 7 February 2020, the day after the WST inspection.

The evidence of Mr Cocker, a ministerial staffer and the Attorney-General, as well as some documentary evidence, indicates that by this time Mr Cocker was already considering a prohibition notice. He mentioned the possibility of the notice during the meeting.

There is conflicting evidence about the content of the discussion at the RFM on 7 February, particularly about what the Attorney-General said to, and asked of, Mr Cocker.

Mr Cocker's sworn evidence was that the Attorney-General and a staffer asked him what he was going to do about the forest protests. More particularly, he alleged that the Attorney-General asked him, 'what are you going to do about stopping these protestors'. If true, this could have been an attempt to influence the Regulator.

Mr Cocker's sworn evidence was provided with detail. He expressed surprise that he had been asked such questions in that forum and said he was taken aback. Mr Cocker alleged that he responded to the Attorney-General by saying, 'Well Minister, with respect, that's a matter for the Regulator to determine.'

The Attorney-General gave sworn evidence that she did not ask the questions alleged by Mr Cocker. She said Mr Cocker provided an update (as he did at other RFMs) based on what he thought may generate media interest, and therefore may require her awareness. The Attorney-General said that Mr Cocker volunteered to her that he was considering a prohibition notice.

A ministerial staffer provided sworn evidence to the Commission about what occurred at the RFM. The staffer did not recall the exact words used. However, they did say that the ministerial office only sought updates and that no directions were given to Mr Cocker. Like the Attorney-General, the staffer said that it was Mr Cocker who raised the prohibition notice. They said that this aligned with Mr Cocker's practice of updating the Attorney-General on high profile matters that may become public.

The sworn evidence of the Attorney-General and the staffer was also provided with detail.

Two senior State Servants were also present at the meeting and also provided sworn evidence. Neither had any recollection of the questions attributed to the Attorney-General by Mr Cocker. If such questions had been asked, one would expect such experienced and senior public officers to recognise them as improper and have some recollection, even several months later.

There is, therefore, no witness evidence to corroborate Mr Cocker's evidence about the RFM. Instead, the witness evidence contradicts his evidence.

## Drafting the prohibition notice

That morning, 7 February 2020, the WST office received further details of the inspectors' observations from the previous day. In the afternoon, after the RFM, Mr Cocker commenced drafting the notice and sought further WST checks in support of it.

At 2:28 pm, Mr Cocker emailed the then WST Director Industry Safety a draft of the notice. Mr Cocker involved the Director and another WST staff member in drafting the notice. There is no evidence that either of these staff had concerns about political influence motivating Mr Cocker.

## Ongoing contact with Attorney-General's office

Mr Cocker gave evidence that, following the RFM, there was frequent contact from the Attorney-General's office seeking updates. Other than this claim from Mr Cocker, there is no evidence that there was an increase in the frequency of such requests.

Mr Cocker also made allegations about a phone call from a ministerial staffer on 11 February 2020. Mr Cocker said that the staffer sought an update. Mr Cocker said that the staffer told him

*the Attorney's really keen to learn what's happening Mark, because Cabinet are hot to trot on this one ... [The staffer] indicated to me that the Cabinet and the Attorney are really keen to see action happen with regards to the forest protest activity, so can you just send me through what you're doing because the Attorney wants to have a look at it.*

As allegedly agreed in the call, Mr Cocker sent the staffer a draft of the prohibition notice he intended to serve on the BBF. The content of this draft notice was substantially the same as the final notice.

There are no witnesses to Mr Cocker's telephone conversation with the Attorney-General's staffer. The staffer denied using the phrases as suggested by Mr Cocker, and said that the

*use of words such as 'what's happening' would only relate to gaining a status update on the matter. I can categorically state that such words were never intended to convey a direction or instruction of any sort.*

On 21 February 2020, Mr Cocker was interviewed on ABC Radio. In the interview, he categorically denied any contact from the Government about how he should respond to protestors. This contradicts evidence he gave to the Commission that the Attorney-General asked him what he was going to do about the protestors, and that the staffer told him Cabinet wanted 'to see some action'.

## 7.2. After service of the prohibition notice

The WST inspectors completed their report on 13 February 2020. WST provided a copy of the report to STT and Britton Timbers on 17 February 2020, but did not provide a copy to the Foundation.

Mr Cocker completed drafting the notice, and it was served by email on the Foundation at 1:51 pm on 20 February 2020. At 2:07 pm, Mr Cocker emailed the notice to a staffer in the Attorney-General's office, saying 'served'.

The notice was broad. It directed the BBF to cease protest activity across the whole of Tasmania. The notice documented the grounds for Mr Cocker's belief that there was a state-wide safety risk involving the BBF. This included activities that the WST worksite inspection had brought to Mr Cocker's attention.

Mr Cocker's evidence suggests that his consideration of a prohibition notice gathered momentum after receipt of the information from the inspection and after questions from the Minister's office and the Minister, including at the RFM. But Mr Cocker was adamant that it was his decision to serve the notice:

*I certainly can't say that I felt myself under any pressure or being intimidated or otherwise or harassed to make a particular decision or to take a particular line of action.*

Although it was not unusual for the Regulator to serve a prohibition notice, the office had never served one on workplace protestors. However, it does not necessarily follow that improper purpose motivated Mr Cocker. The current Regulator gave evidence that the activity observed at the site inspection was unsafe and would have motivated WST to take action against any organisation.

It was unusual that WST did not engage with the BBF before serving the notice. Although unfortunate, the evidence suggests that this was poor judgment on Mr Cocker's part and not related to the motivations for the notice.

Similarly, the decision to make the prohibition state-wide may have been misguided. However, the evidence indicates it was based on genuine reasoning and proper safety-related motivations, being that BBF protests can and have occurred state-wide.

The Commission's Investigator searched the Outlook accounts of all relevant persons, including deleted items, and examined other records held by the Department and WST. While a significant number of emails and other records about the events in question were examined, no documentary evidence demonstrated political or Government influence was involved in Mr Cocker's decision to serve the notice. Instead, the documentary evidence was suggestive of safety issues guiding Mr Cocker's decision-making.

## 21 February 2020 – the media release

A critical factor in generating allegations that the notice was improperly motivated was the reference to a Government 'referral' to WST in a 21 February 2020 Government media release about the notice.

The media release contained a factual error: there was no Government referral to WST about the BBF. Emails clearly show that the reference to a referral was a mistake, caused by a communication breakdown between the Government Communications Office and ministerial offices. The media release approved by the Attorney-General was not the same as the one that was released; the Attorney's approved media release did not contain a reference to a 'referral'.

The Government did not correct this mistake, nor did Minister Barnett when he later had an opportunity to do so on the radio.

Mr Cocker was angry about the media release. He alleged that the media release breached procedural fairness obligations that were owed to the BBF concerning the notice. The Commission has sought advice about this issue. We do not believe that there are any procedural fairness obligations attached to a prohibition notice. Similarly, there were no confidentiality obligations breached by the media release.

## Court challenge

The BBF moved to appeal the prohibition notice. On 24 February 2020, the BBF's legal representative emailed Mr Cocker two documents filed that day in the Magistrates Court, including an affidavit sworn by BBF CEO Steven Chaffer. The appeal was set for 26 February 2020.

Mr Cocker engaged with Ms Wilton on 25 February 2020. He sought her views on issues related to the appeal. Mr Cocker forwarded Ms Wilton a copy of the affidavit and asked for her thoughts.

Mr Cocker was asked about this contact with Ms Wilton. He said:

*Given the long time nature of Ms Wilton's involvement in the Bob Brown Foundation, the litany of complaints that she had made to my office, I considered it appropriate, necessary and convenient given I was due to defend the matter in court the following day to provide Ms Wilton with a copy of the matter ...*

*[O]ther people ... were emailing me asking for a copy of this particular affidavit and I told them to ... obtain a copy from the court. I didn't provide this to anyone else. I provided it to Ms Wilton simply on the basis that I held the view that it was necessary and convenient in accordance with Section 153(1) of the Work Health and Safety Act to seek information from Ms Wilton that may assist in mitigating or distilling or rebutting any evidence that may have been put forward by Mr Chaffer and the Bob Brown Foundation.*

In the Magistrates Court on 26 February 2020, both parties agreed that the prohibition notice would be set aside.

## 7.3. Conclusion

Mr Cocker made allegations about what was said to him by the Attorney-General and one of her staff. Even so, he denied that the prohibition notice was motivated by anything other than safety concerns. Other evidence, including Mr Cocker's own public statement, has not corroborated his allegations about the Attorney-General and her staff member.

And, irrespective of whether or not it was the best decision, the evidence does show genuine safety-related triggers for Mr Cocker's decision to serve a prohibition notice on the BBF. It was Mr Cocker's idea to serve the notice, and it was his decision as Regulator to effect service. There is no evidence to support allegations that Mr Cocker was motivated by political or other improper purposes.

Ms Wilton was persistent in her advocacy for the forestry industry. It is incumbent on an independent Regulator to ensure their dealings with such community members remain professional and independent, as they should with Government.

Mr Cocker corresponded with Ms Wilton, as well as speaking with her on the telephone. On the whole, his engagement with her presents as independent.

However, his decision to send Ms Wilton a copy of Mr Chaffer’s affidavit and to seek her views does not present as independent. He did not provide it to anyone else who requested a copy. This action risked generating perceptions that Mr Cocker was acting on Ms Wilton’s behalf and, more particularly, against the BBF. Such perceptions are clearly damaging to an independent regulator.

## 7.4. Findings

### Findings

Allegation 1: Mark Cocker improperly used his role as Regulator to take action against the Bob Brown Foundation Inc.

**Mr Cocker’s decision to serve a prohibition notice on the BBF was underpinned by his reasonable belief of a state-wide safety risk involving the BBF.**

**Mr Cocker did not act on perceived or actual pressure or influence from any person, including Minister Barnett and Attorney-General Archer or their staff, when he decided to issue a prohibition notice.**

Allegation 2: Mark Cocker’s handling of alleged Bob Brown Foundation safety issues lacked independence.

**Mr Cocker’s decision to serve a prohibition notice on the BBF was underpinned by his reasonable belief of a state-wide safety risk involving the BBF.**

**Mr Cocker did not act on perceived or actual pressure or influence from any person, including Minister Barnett and Attorney-General Archer or their staff, when he decided to issue a prohibition notice.**

**Mr Cocker’s decision to share a copy of Mr Chaffer’s affidavit with Ms Wilton and seek her views on it could have led a reasonable person to conclude that he was not acting with independence.**

Allegation 3: The Hon Elise Archer MP exercised, or attempted to exercise, undue influence over the Regulator in relation to the Bob Brown Foundation in 2019-20.

**Mr Cocker did not act on perceived or actual pressure or influence from any person, including Minister Barnett and Attorney-General Archer or their staff, when he decided to issue a prohibition notice.**

**Minister Archer did not attempt to exercise undue influence over the Regulator in relation to the issuing of a prohibition notice.**

Allegation 4: The Hon Guy Barnett MP exercised, or attempted to exercise, undue influence over the Regulator in relation to the Bob Brown Foundation in 2018-2020.

**Mr Cocker did not act on perceived or actual pressure or influence from any person, including Minister Barnett and Attorney-General Archer or their staff, when he decided to issue a prohibition notice.**

**Minister Barnett did not attempt to exercise undue influence over the Regulator in relation to the issuing of a prohibition notice.**

Allegation 6: In 2018 - 2020, ministerial staff failed to respect the Regulator's independence.

**No ministerial staff failed to respect the Regulator's independence in terms of action that could be taken by the Regulator in relation to the BBF and ongoing forestry protests, including in relation to the issuing of a prohibition notice.**

## PART D SYSTEMS

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### 8. Systemic issues and misconduct risks

Investigation Tyndall involved the consideration of systemic issues and misconduct risks, specifically those related to the independence of officers and Government members.

#### 8.1. Communication with lobbyists

This report has discussed Ms Wilton’s activity as a persistent ‘lobbyist’. Ms Wilton is an unpaid and self-appointed advocate for the forestry industry.

There is evidence that ministerial staff met and communicated with Ms Wilton about her concerns. There is also evidence that staff identified Ms Wilton as a community member who could benefit the Government as a supporter of the Government’s position on forestry. There is nothing improper about this.

In this matter, there were opportunities for ministerial staff to act improperly; however, there is no evidence that they did so.

The Commission’s view is that Ministers and their staff should be alert to the risk that lobbyists pose to themselves, bureaucrats, and independent Regulators such as Mr Cocker. They should moderate their interactions in accordance with that risk, as it appears Ministers and staff have in this case.

#### 8.2. Communication between staffers and the Regulator

Ministerial staff regularly made contact with and asked questions of Mr Cocker through the Department. At other times there was direct contact between Mr Cocker and ministerial staff.

There does not appear to be any improper conduct or intent by ministerial staff in such contact, and there is no evidence that Mr Cocker at any time advised ministerial staff that he would prefer not to be contacted directly. However, he alleged that he did make this request on multiple occasions through the Department.

The Department’s Deputy Secretary indicated that difficulties arising from direct contact with ministerial staff is not an issue limited to the Regulator. The Secretary has advised that the Department has discussions with ministerial staff to establish a clear and shared understanding of who to contact within an agency and how to contact them; this will often depend on the individual circumstances and, to an extent, the experience of both Agency and ministerial staff.

Contact directly from ministerial staff to an employee is not necessarily inappropriate. On the contrary, there are many times when this is quite legitimate. The Department’s approach seems to be balanced.

The Commission's view is that, if there is a concern about proper governance and process from a departmental or Ministerial office perspective, measures should be taken to moderate such contact.

### **8.3. Communications with the media**

Mr Cocker's position was complicated, as he had dual roles as a State Servant and as a regulatory officer. The former is subject to Government media protocols, whereas the latter is independent of Government.

Mr Cocker gave evidence that he was required to seek approval from the Government Communications Office before making media comment. Documentary evidence obtained in this investigation was supportive of that evidence. Such a practice presents as contrary to the independence of the Regulator's role (albeit not a State Servant's role).

The Commission's view is that the Tasmanian Government Communications Office should be mindful of the enhanced importance of independence for some roles, including the Regulator. It is not the role of Government Communications staff to make decisions about whether an independent officer makes public comment.

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