

STEP AUSTRALIA *NEWSLETTER*

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WELCOME FROM STEP AUSTRALIA CHAIR

Welcome to the ninth edition of the quarterly *STEP Australia Newsletter*.

You may recall from my last message to you that the initiative our region will be focusing on in 2020 is a membership drive. STEP Australia will be seeking to increase awareness of the benefits of TEPs while expanding its membership as a region. I once again encourage you to invite your legal, financial and accounting colleagues to a STEP event and let them experience first-hand the quality of your branch education opportunities. I know of no other professional association in Australia that can boast of the quality of judges, professors and senior government officials who regularly support STEP.

STEP Australia is working in collaboration with your branch to ensure efforts are maximised as a region. Take the opportunity, as I have done, to send a colleague a link on how Australian practitioners can join STEP: www.stepaustralia.com/join-us/how-to-join-step. I know that it may look a little complex at the moment, but we are simplifying the message: it really is easy to join STEP.

ARE YOU LOOKING TO GET INVOLVED?

There are various ways you can get involved and contribute. Get in touch with your branch committee or a STEP Australia Board Member if you would like to further your involvement with STEP. We are keen to develop a greater involvement in policy matters. Join us and help us to make the STEP voice one to be listened to. If membership is more your style, we are currently developing a mentor programme. Another way to contribute is to become active on the STEP Australia LinkedIn page at www.linkedin.com/company/step-australia

On a more personal note, I would like to say my thoughts go out to those affected by the devastation the bushfires have caused around Australia. The start to 2020 is likely to have affected either you personally or someone close to you. Amidst the devastation wreaked by the recent bushfires there are inspiring stories of compassion and solidarity. Witnessing Australians come together to unite and rally around those in need shows the true power of community and kindness.

With best wishes,
Peter Bobbin TEP,
STEP Australia Chair



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The accuracy of cognitive screening tests

Associate Professor Gail Robinson¹ interviewed by Sarah Doblo and Dan Morgan

There is no single legal definition for capacity, and there is no single definitive medical or psychological test. In practice, frequently the only available evidence is a cognitive screening test administered by a GP. In a world-leading paper based on research at the Wesley Hospital and the University of Queensland, the accuracy of one of these screening tests was assessed, with startling results. Here, one of the co-authors of this paper is interviewed by two succession lawyers to explain the results and their relevance to lawyers in practice.

Experienced practitioners are familiar with the ‘golden’ (if tactless) rule of obtaining contemporaneous medical opinion as to capacity in at-risk cases. This article looks at the inappropriateness of cognitive screening tools such as the Mini-Mental Status Examination (MMSE) and Montreal Cognitive Assessment (MoCA) for establishing capacity, and examines who and what to ask when seeking confirmation of capacity.

COGNITIVE SCREENING

Your article assumes a level of knowledge of tests such as the MMSE and MoCA. Could you explain what the purpose of these tests is?

These tests are described as cognitive screening tools. They are designed to be used as a relatively quick and cheap assessment that can be carried out in acute situations and at bedside, or at the GP’s practice. Minimal specific training is required to administer the tests. They are designed to detect global impairments and should then be followed up by a more formal assessment called a neuropsychological evaluation or cognitive assessment (CA).

Our paper was prompted by debate as to how sensitive the screening tools were in brain tumour patients, as the prevalence rates of cognitive impairment had varied in other studies between 29–91 per cent. We specifically looked at a group of patients during the acute period following tumour resection by comparing the results of a MoCA screening tool versus a formal CA.



In practice, we seem to see more MMSEs than MoCAs. In your opinion, is there a reason to prefer one over the other?

Previous studies that we refer to in our paper have shown that the MoCA has been increasingly favoured over the MMSE as it has been shown to have greater sensitivity for detecting cognitive deficits in patients with brain tumours, stroke, sub-arachnoid haemorrhages and silent cerebral infarcts.

Both of these tests are designed only to be screening tools and to detect general decline, such as that in dementia, and not what are referred to as ‘domain-specific’ or ‘focal cognitive’ deficits.

What are these specific domains?

Depending on the condition the patient suffers from, different conditions can affect different parts of the brain.

We know that different parts of the brain perform different functions, and that cognitive ability is made up

of different functions, known as domains. Different tests can be used to assess these specific areas, depending on the purpose for which one is testing. In our study, we used a comparatively brief but standard CA that took between one and 1.5 hours to administer and which assessed six domains: executive function, abstraction, attention, memory, language and visual perception.

The MoCA includes items that look at these six domains, but the question was how sensitive it was.

Often in practice the only medical evidence is an MMSE, and where patients have scored a ‘normal’ score this is often relied upon as positive evidence that proves the patient has capacity. From a psychological point of view, what is the probative value of a ‘normal’ score on an MMSE or MoCA? Are lawyers reading too much into these test results?

Yes, a ‘normal score’ is when a score falls within a statistically determined range compared to scores obtained from a representative population sample. A normal range is typically based on a criterion, such as what 90 per cent or 95 per cent of a healthy population score, that determines a ‘cut-off’ score for a normal performance. MoCA scores range from zero to 30 and a score of 26 or higher is generally considered normal.

‘Capacity refers to an individual’s ability to make a specific decision at a particular point in time, and does not refer to the ability to make all decisions’

However, this cut-off criterion was based on an initial study comparing healthy individuals to an older dementia sample of mild cognitive impairment and Alzheimer's disease with an average age of about 72. This means that for other clinical populations like brain tumours or stroke, the nature of cognitive deficits is likely to differ and the average age may also vary, which can impact the sensitivity of the MoCA or MMSE.

Can you think of any particular point or strategy that you think legal practitioners should include in their toolkit?

Ask what CA has been done, by whom and why. Generally, a GP assessment will be insufficient, with greater accuracy achieved by specialists for specific reasons (e.g. concern about forgetting or odd behaviours).

What are some strategies for a legal practitioner to use to detect lapses in executive function? What sorts of things should prompt a request for further assessment and by what sort of practitioner?

The key is any hint of a recent change in, or uncharacteristic, behaviour. This could be failing to manage work or other regular activities; an increase in impulsive or risky behaviour; disinhibition and saying things they do not mean; decreased engagement in activity; poor organisation or problems with carrying out regular activities like cooking or managing finances. Any changes should prompt the need for further assessment by both a medical practitioner (neurology, psychiatry) and a clinical neuropsychologist. An important area not covered in this article is comprehension or understanding what is at stake and being able to think through a set of circumstances in order to make a decision. This is discussed in our paper.²

The third limb of the *Banks v Goodfellow* test for testamentary capacity requires 'that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made'.

What are some strategies for testing for the presence of 'delusions'? What would current medical or psychological learning describe as an 'insane delusion'?

A delusion refers to a false belief that is held despite evidence to the contrary about an external reality. Establishing the presence of a delusion requires that a person holds the belief despite being faced with information that contradicts this belief. Psychological and medical areas rarely refer to an 'insane delusion', but rather characterise the type or nature of the false belief that a person holds (e.g. persecutory or grandiose beliefs). In order to determine if a delusion is present, other cognitive capacities need to be largely preserved.

One of the great phrases in the judgments concerns the doubt that sometimes arises in marginal cases,

especially where there is a condition that causes a steady decline in capacity. 'There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine.'³ Are there any modern developments that might assist?

Capacity refers to an individual's ability to make a specific decision at a particular point in time, and does not refer to the ability to make all decisions. In order to make an informed decision about any aspect of life, including finances and legal matters, an individual needs to understand the relevant information, apply abstract reasoning, decide on an appropriate course of action and then effectively communicate that decision. Current practice is to establish each of these aspects for each decision. If there is any doubt, then a formal neuropsychological evaluation, or, depending on the specific decision, a functional capacity evaluation is relevant.



Dr Daniel Morgan is a Barrister at Cedric Hampson Chambers, and Sarah Doblo is a Senior Associate at McCullough Robertson Lawyers



Sometimes lawyers are faced with clinicians who are hostile to or dismissive of their requests for assessments. Some of these clinicians also clearly do not know what to do. The result is that valuable evidence is not collected at the time and, if it becomes contentious – often because of ambiguous or insufficient evidence – eventually lawyers and doctors or psychologists have to do the best they can retrospectively. Any suggestions?

I think clinicians generally doubt the purpose for which a report or assessment will be used and think that lawyers will routinely misinterpret or extrapolate results. This may be overcome if lawyers proactively establish a good working relationship with a specific clinician and are as transparent about the aim as possible. Ideally, a brief CA would be better than a cognitive screen, and this needs to be held up as the goal for any case where capacity is in question.

CONCLUSION

Careful practitioners should not assume that a GP's opinion based on an MMSE will be regarded as sufficient or definitive upon forensic examination in a contested matter. Practitioners should be mindful of professional guidelines such as the Queensland Law Society's *Queensland Handbook for Practitioners on Legal Capacity*.⁴ When seeking an opinion on capacity, they should also specifically include the relevant legal principles upon which they seek the report, so as to guide the expert's opinion. Given the potential for delay in obtaining such reports and, in some areas, the lack of availability of expert practitioners, there is no reason to delay the production of the will or other document if coherent instructions can be taken, subject to the guidelines set out in the above publications.

¹ School of Psychology, the University of Queensland, researchers.uq.edu.au/researcher/2299

² www.researchgate.net/publication/320041134_Changes_in_Cognition_and_Decision_Making_Capacity_Following_Brain_Tumour_Resection_Illustrated_with_Two_Cases ³ Lord Cranworth in *Boyse v Rossborough* cited by Sir James Hannen in *Boughton v Knight* (1873) LR 3 65, at 67 ⁴ Available at www.qsls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity

To BDBN or not to BDBN? That is the question

Peter Bobbin TEP, Principal Lawyer, Coleman Greig Lawyers

All too often, clients adopt a binding death benefit nomination (BDBN) over their superannuation and they do not know why. They are told it will make their superannuation death benefit more certain, but is that the point? Is that the best answer? Is that even the best question?

For many Australians, superannuation is their major financial asset; it has become a critical aspect of every estate plan. But all too often they will have a BDBN because they were told to have one, when for them it is simply wrong.

By way of an upfront admission, the writer does not have a BDBN. This is by choice. And that is the point!

SUPERANNUATION NOT AUTOMATICALLY PART OF A DECEASED ESTATE

The first step in superannuation estate planning is to understand the death benefit payment rules that apply. There are many examples in the variety of superannuation arrangements that exist where the payment of the member's death benefit is fixed in advance. Where there is no choice to be made because the rules are fixed, a BDBN is irrelevant and potentially misleading, so bespoke planning is needed to meet this outcome.

The most usual (default) superannuation death benefit rule is that the trustee has discretion to distribute a superannuation death benefit to any or all of a deceased person's superannuation dependants. This is often their spouse, children, any financially dependent or interdependent person, or the executor/administrator of their deceased estate for the purposes of that estate. This is why, generally speaking, superannuation does not automatically form part of a deceased estate and may therefore not be dealt with in accordance with a person's will.

This is where the BDBN can be considered, but in the writer's view that consideration should also be about purposefully not having one. In essence, the question comes down to whether flexibility is better than rigidity.

Where careful estate planning reveals that maximum flexibility is desired so as to enable meeting any future unknown circumstance, avoid the BDBN. Often the best plan is not



to have one and to rely on the superannuation trustee death benefit discretion as to whom is to be paid and in what form (lump sum or pension), at what time and in what amount.

Flexibility can open up choice and opportunity.

Where there is a reason to have a BDBN then embrace this, but make sure that the reason is enough to justify the rigidity that a BDBN will bring.

Also consider whether the BDBN is enough. If the

reason for the BDBN is important, it is likely more is needed.

It is important to know that the BDBN brings rigidity. If the BDBN is to the estate, this will put the superannuation into the path of any challenge upon the estate. It will also delay access to the proceeds until an estate is confirmed.

There may be tax outcomes that cannot be worked around.

The beneficiary of the BDBN may lose social security support benefits or, as the recipient of the financial benefit, no longer enjoy asset protection measures.

Where these outcomes are justified by the reason for the BDBN, it can be adopted. But maybe not enough careful consideration has been given to the value of flexibility, or perhaps there is a better way?

Flexibility can enable opportunities that are otherwise lost with a BDBN.

Leaving the decision as to who and how, as well as what form and how much, may appear to be putting a great deal of faith in those making that decision. But where there is confidence in the person who holds the power to make the decision, it can be quite appropriate to leave them with the discretion, which can be exercised at the time of death under the circumstances then existing.

Having regard to the nature of a self-managed superannuation fund (SMSF), this is more likely the type of superannuation interest where there can be faith in the person with continuing control and management of the fund after the death of a member.

The most common form of SMSF has two or more members (more than 73 per cent, according to the Australian Taxation Office). The majority of these are two member funds, with the majority of these being couples in a relationship. If the general estate plan involves vesting in the survivor flexible decision-making, then why place strictures upon them with a BDBN?

In such a situation the BDBN is not necessary. What is

‘The BDBN brings rigidity. If the BDBN is to the estate, this will put the superannuation into the path of any challenge upon the estate’

‘If the member wants certainty and is satisfied with rigidity, it is appropriate to consider the BDBN’

important is to make sure that the continuing control of the superannuation will be with the person in whom the decision-making faith is expressed. And if that person is to be able to personally pay the superannuation death benefit to themselves, conflict release statements will be needed.

BINDING NOMINATIONS ARE VERY SPECIFIC

It is trite to recognise that BDBNs are very important and valuable instruments of an estate plan that can control vast sums. These are precise documents; a failure to complete them correctly can result in failure to achieve the intended objective. If a BDBN is chosen, it is important to get it right.

In March 2015, the Supreme Court of Queensland (the Court) was called upon in *Munro v Munro* to consider whether a BDBN was valid. The particular document expressed a nomination in favour of the ‘Trustee of the Deceased Estate’. The Court found that this phrase had no legal meaning and as such the nomination failed and did not apply. The Court observed that:

‘The nomination form must be construed on its face and having regard to its purpose ... It is not appropriate to construe the nomination form by reference to the will when the nomination is for the purpose of payment of the death benefit from the fund.

[...]

‘There is no power given to the trustees under the trust deed or otherwise to dispense with compliance with the conditions set in clause 31.2 [of the trust deed] for a binding death benefit nomination.’

This and the many other cases that are making their way through the courts of Australia emphasise the importance of making sure that whatever decision is made regarding a person’s superannuation, it must be carried out in strict compliance with the terms and conditions of the instrument that represents its constitution or fundamental rules, most commonly the trust deed.

Generic or off-the-shelf binding superannuation death benefit nominations must not be used; it would be merely coincidental for such a form to be compliant within the terms of a person’s superannuation arrangement.

BINDING OR NOT?

The question as to whether to have a binding superannuation death benefit nomination is personal. It is important to carefully consider the pros and cons and to make an informed decision that is best suited to each person’s circumstances. A possible matrix to assist the decision may be represented as follows:

Binding superannuation death benefit nomination	Fixed or rigid, unchangeable after death has occurred (though the intended person can disclaim the benefit).	Confident and certain as to who gains the benefit.
Non-binding superannuation death benefit nominations	The superannuation death benefit decision remains with the trustee but they are given a personal (non-mandatory) guidance by the member	No confidence or certainty but it achieves a useful guide for the trustee’s decision
No superannuation death benefit nominations	The superannuation death benefit decision rests entirely with the trustee	No certainty but complete flexibility and discretion; relies on confidence in the trustee role

WHAT IMPACTS THE DECISION TO BIND OR NOT?

Really this is a question of whether to ‘allow’ the trustees of the superannuation arrangement flexibility and discretion or to bind and direct what they must do.

If certainty is wanted, is a binding nomination best?

Where rigidity is appropriate it is the writer’s preference in an SMSF situation that the superannuation fund trust deed is amended and the rigid rule is hard-wired into the trust. Due to the care taken in amending the trust deed, simple failures such as those mentioned in *Munro v Munro* above are less likely to occur.

This trust deed amendment approach is only available for SMSF situations. It is also more advisable where the motivation for the binding or fixed process is a fear that a person will challenge the superannuation.

CONCLUSION

If the member wants certainty and is satisfied with rigidity, it is appropriate to consider the BDBN. But, if it involves an SMSF, the BDBN should be avoided in favour of a trust deed amendment; this will create greater certainty.

However, if, as is the writer’s situation, the desire is to allow another to have flexibility at a future unknown time, the BDBN and any binding process should be avoided. Flexibility will then be built into the superannuation part of the estate plan.

Introducing... Mark Streeter TEP

STEP New South Wales Branch Chair

WHAT PROMPTED YOU TO BECOME A MEMBER OF STEP?

I joined STEP in 2014 because I was attracted by the high-calibre professional development programme, together with the collegiate interaction.



have a master of laws from the University of New South Wales from 1999. I am particularly interested in seeking remedies for fraud in the context of elder law (i.e. the abuse of relationship of trust for benefit). In the late 1990s, I lived for a number of years with my grandmother (who had vascular dementia) and accordingly have a keen appreciation of the vulnerabilities experienced by people as they age.

WHAT STEP RESOURCE DO YOU USE OR APPRECIATE THE MOST?

First and foremost, the professional development meetings, followed by the *STEP Journal* and website.

TELL US WHAT MOTIVATED AND INSPIRED YOU TO GAIN THE EXPERTISE YOU HAVE TODAY?

My practice is dispute resolution for families, which has a broad effect, particularly in estates, family businesses, wills and trusts. The interaction of trust and businesses in a family context is often a complicated factual and legal matrix. I am an accredited specialist in commercial litigation (corporate insolvency) and

WHAT ISSUES ARE YOU EXCITED ABOUT STEP ADDRESSING IN THE FUTURE?

The cross-disciplinary composition of the membership of STEP makes it uniquely qualified to address the key mission of our members as we advise families across the generations. There are proposals for legislative change to the legal considerations regarding decision-making capacity, and members of STEP will make a valuable contribution to this dialogue.

WHAT IS YOUR MOST MEMORABLE STEP EVENT?

The STEP Asia Conference 2019 in Singapore.

WHAT IS THE BEST ADVICE OR GUIDANCE YOU HAVE EVER BEEN GIVEN?

Seek to understand and address the root cause of the problem – not just the symptoms.

WHAT 'MUST READ' BOOK WOULD YOU RECOMMEND?

Being Mortal: Medicine and What Matters in the End by Professor Atul Gawande. It is a surgeon's view of the physiological effects of aging and how a client-focused advisor will assist to empower and implement supported decision-making throughout that aging journey.

OUTSIDE OF THE OFFICE, WHAT DO YOU LOOK FORWARD TO?

Holidays with my wife and three daughters, cycling and pretending to be younger than I am by learning to kitesurf.

Tribute to Richard Williams TEP

It is with great sadness that STEP announces the passing of our esteemed colleague Richard Williams on 25 November 2019, aged only 49 years.

Richard commenced his distinguished career in the UK, having obtained his MA at Cambridge, and built a significant reputation in the trustee industry. As a result of that work, he conceived and acted as general editor of *A Practical Guide to the Transfer of Trusteeships*, which set the standards for transfer of trusteeships in ten jurisdictions and is currently in its third edition.

Richard commenced practice at the Bar in Queensland in 2012, and quickly developed a reputation as a leading succession law barrister.

In addition to his practice, Richard freely gave of his time as a lecturer, particularly in the College of Laws LLM programme in wills and estates. He also continued his authorship, as co-author of *Statutory Will Applications: A Practical Guide*, the leading text on that topic in Australia.

Richard was Chair of both STEP Queensland as well as STEP Australia, during which period both entities developed significantly. For his exceptional long-term contribution to STEP, Richard was awarded a STEP Founder's Award in 2017.

In a few short years in Australia, Richard became universally well regarded as an advocate, educator and author. He will be sadly missed by all who knew him.



UPCOMING EVENTS

The STEP branches provide forums in which professionals from different areas can collaborate and share knowledge and experience. We welcome all professional advisors, educators and students with a trusts and estates focus in their practice, whether for private or corporate clients. We are committed to building strong links between our local, national and international STEP colleagues.

STATE	DATE	EVENT	VENUE
SA	Thursday 2 April 2020 5:30-7pm	SEMINAR Offshore tax aspects of deceased estates	NAVAL, MILITARY & AIR FORCE CLUB OF SA, ADELAIDE
NSW	Wednesday 8 April 2020 12:30-2pm	LUNCH AND LEARN SESSION Tips and tricks when designing the testamentary trust Speaker: Peter Bobbin TEP	COLEMAN GREIG LAWYERS, LEVEL 39, 19-29 MARTIN PLACE (MLC CENTRE), SYDNEY
NSW	Wednesday 15 April 2020 5:30-7pm	SEMINAR Topic and Speaker TBA	BANCO COURT SUPREME COURT OF NSW
QLD	Tuesday 28 April 2020 12:30-1:30pm	LUNCHTIME SEMINAR FPA year in review: key cases and take-aways from the last 12 months Speaker: Rob Cumming, Barrister	QUEENSLAND LAW SOCIETY, LEVEL 2, LAW SOCIETY HOUSE, 179 ANN STREET, BRISBANE
NSW	Wednesday 13 May 2020 12:30-2pm	LUNCH AND LEARN SESSION Successfully helping clients to navigate through the complexities of aged care Speaker: Sylvia Liang, Aged Care Specialist, Nexia Sydney	NEXIA SYDNEY FINANCIAL SOLUTIONS, SYDNEY
QLD	Wednesday 13 May 2020 5:30-7pm	#NEXTGEN SERIES Estate planning: cross-jurisdictional planning and other modern complications Speaker: Carla Parsons TEP, Director, Parsons Law	THE COLLEGE OF LAW, ROOFTOP 140 ANN STREET, BRISBANE
NSW	Wednesday 20 May 2020 5:30-7pm	SEMINAR Varying the forfeiture rule; the recent decision in Re+A68:F68 Settree Estates: <i>Robinson v Settree</i> [2018] NSWSC 1413 Speaker: Margaret Pringle, Barrister, Chalfont Chambers, Sydney	BANCO COURT SUPREME COURT OF NSW
NSW	Wednesday 10 June 2020 12:30-2pm	LUNCH AND LEARN SESSION Philanthropy - regulations and incentives for more and better giving? Speaker: Judy Foster, Philanthropy Australia	WESTPAC, 32/275 KENT STREET, SYDNEY
QLD	Wednesday 10 June 2020 5:30-7pm	#NEXTGEN SERIES Estate administration: estate tax 101, myths and epic fails Speaker: Melanie Costin TEP, Director, T&E Accounting	THE COLLEGE OF LAW, ROOFTOP 140 ANN STREET, BRISBANE
QLD	Monday 15 June 2020 12:30-1:30pm	LUNCHTIME SEMINAR Estate Administration and dealing with the ATO Speaker: Ian Raspin TEP, Managing Director, Estates and Trusts, BNR Partners	QUEENSLAND LAW SOCIETY, LEVEL 2, LAW SOCIETY HOUSE, 179 ANN STREET, BRISBANE
NSW	Wednesday 17 June 2020 5:30-7pm	SEMINAR The extent of the personal right of indemnity of trustees generally from the beneficiaries Speaker: Hon Joseph Campbell, University of Sydney	BANCO COURT SUPREME COURT OF NSW
NSW	Wednesday 10 June 2020 12:30-2pm	LUNCH AND LEARN SESSION Philanthropy - regulations and incentives for more and better giving? Speaker: Judy Foster, Philanthropy Australia	WESTPAC, 32/275 KENT STREET, SYDNEY

We welcome all STEP members to attend events hosted by other STEP branches.

For more information on the STEP Australia events calendar, contact Dior Locke at dior.locke@step.org

STEP AUSTRALIA WEBSITE INFORMATION:
www.stepaustralia.com

STEP WORLDWIDE WEBSITE INFORMATION: www.step.org

SEE MORE ON EVENTS AND KEEP UP TO DATE:
Keep informed on upcoming STEP events via the following links:

STEP AUSTRALIA EVENTS PROGRAM:
www.stepaustralia.com/events

STEP WORLDWIDE EVENTS: www.step.org/events

Register your interest to be a speaker at STEP Australia events by emailing Dior Locke at dior.locke@step.org
Can't make an event? Many speakers provide a paper for members. Get in contact to find out more.

STEP AUSTRALIA NEWSLETTER SUB-COMMITTEE

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COMMITTEE MEMBERS: DAVID GIBBS, ROB CUMMING, PAMELA SUTTOR, FIONA FAGAN, CLAIRE HAWKE-GUNDILL
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