

# Memo:

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To: Pool Industry & Specifiers

Attn:

Date: 19 August 2021

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cc:

Subject: BCA misuse of the RFI process in residential pool compliance

Because of a recent increase in RFI's from Auckland council, consisting of nothing but unsupported opinion and interpretation regarding pool compliance, we have provided the attached analysis, with specific attention to the Legislation and Regulation involved:

The Legislation is: The Building Act 2004

The Regulation is: The Building Code F9

As advised in all issued Product Technical Statement: Design packages custom issued by Swish for each project requiring pool consent approval

- Pool compliance is achieved by door-set modification to meet F9 using the cited document NZS 8500-2006 "approved alternative solutions"
- Plus:**
- The Verification method allowed under the Act, with over 5000 systems approved, consented and installed modifying door-sets as the pool barrier.
  - 80% of these consents are in the Auckland region
  - Verification is confirmed per the Drownbase NZ statistics tabled below, which were included in our letter to NZPIA entitled Barrier types - Child drownings

In support of our discussion and request for a review of Determination 2019-001, the following table has been prepared

Period	Child drownings - Pool compliance method			Total child pool drowning	Average per year	Comments
	Isolation Fencing & gates	Doors bolted **	Doors Swish modify			
1980-1987	56	10	NA	66	7	Ex Water Safety NZ publications
1987-1997	41	6	NA	47	5	Ex Water Safety NZ publications
1997-2007	24	4	0	28	3	Note: Swish systems introduced April 2005
<b>Subtotal</b>	<b>121</b>	<b>20</b>	<b>0</b>	<b>141</b>	<b>5.5</b>	Statistic before Swish systems introduced 2005
2007 -2012	23	2	0	25	5	** Doors - bolted or unmodified:
2013	4	0	0	4	4	Ex Water Safety NZ statistics and confirmed by MBIE
2014	3	0	0	3	3	during the "make pool compliance easier" program 2016
2015	2	0	0	2	2	
2016	1	0	0	1	1	
2017	6	1	0	7	7	
2018	3	0	0	3	3	
<b>Subtotal</b>	<b>42</b>	<b>3</b>	<b>0</b>	<b>45</b>	<b>4</b>	Statistic after Swish systems introduced 2005
<b>Total</b>	<b>163</b>	<b>23</b>	<b>0</b>	<b>186</b>	<b>5</b>	Statistic over 38 years ex WSNZ Drownbase

Swish confirmed their Pool Access Safety Systems have modified door-sets for 14 years with all systems installed:

- Being approved as pool compliant without question or operational sabotage being evidenced during this period
- And that there had been no child drownings where Swish systems had modified door-sets for pool compliance...  
*Supported by Coronial records provided for the Determination application that resulted in 2019-001*
- Which confirms Swish system acceptance and approval under the Building Act 2004 using NZS 8500-2006 and/or the Verification method of approval under this legislation

**Confirming:**  
There are No child drownings where Swish systems have been used to modify door-sets as a pool barrier

**Confirming:**  
Statistically, there is no better child resistant safety barrier available

**Confirming:**  
Swish systems meet all legislative and regulatory objectives and requirements

**Legislation:**



**The Legislation: Building Act 2004**

- BCA's should refer to, review and understand the following:

**Section 14A through to 14G**

- **Responsibility of Owner:**
  - Ensuring the building work carried out for the owner, **complies with the building consent and with the building code**
- **Responsibility of the Designer:**
  - A designer is responsible for ensuring the plans, specifications or advice in question, are sufficient to result in the **building work complying with the building code**
- **Responsibility of the Building Consent Authority:**
  - The application for the consent **complies with the building code:**
  - Issuing building consents and certificates in accordance **with the requirements of the Building Act 2004**
- **Responsibilities of the Manufacturer or supplier:**
  - The manufacturer or supplier of a building product states if installed in accordance with technical data, plans, specifications of the manufacturer, **will comply with the relevant provisions of the building code**

**Section 15 (1. a)**

- That all building work must comply with the building code as required under this Act

**Section 16; Building code purpose:**

- The building code proscribes functional requirements and performance criteria with which buildings must comply in their intended use

**Section 17: Building must comply with the building code**

- All building work must comply to the building code to the extent required by the Act

**Section 18: Building work must meet the building code**

- But is not required to achieve additional or more restrictive criteria than required in the building code
- Or, to take any additional work if it already complies with the building code

**Section 19: How compliance with the building code is established**

- A building consent authority *must accept any or all of the following* as establishing compliance with the building code
  - Compliance with an acceptable solution (usually provided by an AS schedule and/or, a NZ standard)
  - Compliance with a Verification method

**Section 20: Regulations may specify one means of complying with the building code**

- Proscribed acceptable solutions and/or proscribed verification methods
- Building design, construction, methods, materials, certified under section 269

**Section 23: Effect of acceptable solution or Verification method**

- A person may comply with an acceptable solution or a verification method in order to comply with provisions of the building code
- Approved solutions and/or Verification method, are not the only means to comply with the provisions of the building code



### Section 162: Purpose

- **1. A. Purpose:** The purpose of this subpart is to prevent drowning of, and injury to, young children by **restricting unsupervised access to residential pools by children under 5 years of age**
- **1. B.** Applies to pools with a maximum depth of water of 400mm or more
- **1. C.** Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age

### Section 162C (4)

- The following persons must ensure compliance with this section
  - (a) The owner of the pool
  - (b) The pool operator
  - (c) The owner of the land on which the pool is situated
  - (d) The occupier of the land where the pool is situated
  - (e) The occupier of the property where the pool is situated

### Regulation:

#### The Building Code F9: Means of restricting access to residential pools

- **F9. 1 Objective:** is to prevent injury or death to young children involving residential pools
- **F9.2 Functional requirements:**
  - **Must have a means of restricting pool access that prevents unsupervised access by children (under 5 years of age).**
- **F9.3 Performance:**
- **F9.3.1** Residential pools must have or be provided with, physical barriers that restrict access to the pool (or immediate pool area) by unsupervised children (Under 5 years of age)
- **F9.3.3.2 Barriers must either**
  - (a) surround the pool or
  - (b) in the case of a small heated pool, cover the pool itself
- **F9.3.3** A barrier surrounding the pool must have **no permanent objects or projections on the outside** that could assist children negotiating the barrier
  - **Any gates must:**
    - Open away from the pool
    - Not be able to be readily opened by children
    - Automatically return to the closed position after use
- **F9.3.4:** Where the building forms all or part of the immediate pool area barrier
  - **(A) Doors between the building and the immediate pool area must not be readily opened by children and must either**
    - (i) Emit an audible warning when the door is open or
    - (ii) The door must close automatically after use
  - **(B) Windows opening from a building into the immediate pool area must be constructed or positioned to restrict the access of children**

### Conclusion:

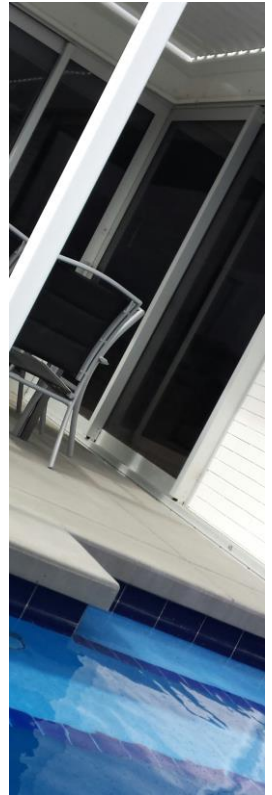
The foregoing summary of the Legislation and detailed regulation, is to enable a discerning reader to ask the same question Swish pose in their PTS: Design documentation package, issued for every project which is required to be answered by a BCA, if rejecting a consent under the Act or Code..

- **“Any rejection of this consent application** to modify door-sets with pool access, **should be advised on the basis of specific legislative or regulatory clause** the use of the Swish systems, or the modified door-sets, are in breach of...”

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**Conclusion:** (continued)

- **This question has been asked of MBIE** (in regard to Determination 2019-001 and 2019-019) and has not been answered in over 4 years, not even by the CEO of MBIE
- **This question has been consistently asked of Auckland Council:**
  - At every RFI that our clients have received and passed on to Swish, for a reply
  - Swish and their clients, without exception, have not received a reply that would indicate any breach of legislation or regulation, since the non-mandatory (and unenforceable) AS1 schedule was introduced on 28 April 2017
- Readers should be aware, Swish Automation Ltd have NZ designed and manufactured all their Pool Access Safety Systems to meet the Legislation and Regulation F9
- Designed to achieve the “approved alternative solutions” advised in the NZS 8500-2006 standard, published in November 2006 as a compliance document and subsequently cited in the Building Code F9
- **Noting**, during the 16 year period to date, not one child has drowned where Swish systems have been used to modify door-sets as the designated pool barrier between house and pool.



**Comment:**

- **Uninformed and unsupported opinion and interpretation is not Legislation or Regulation**, and has no place in approving or determining, any pool consent application
- **Uninformed and unsupported opinion and interpretation** from a BCA will not be accepted by Swish Automation Ltd, as a reason for rejection of a pool consent application.

A handwritten signature in blue ink, appearing to read "Les J Hole".

**Les J Hole**  
**Mobile 0274 77 9000**

Director and CEO  
Swish Automation Ltd