

Memo:

To: NZ Pool Industry Association

Attn: The CEO and Executive

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Subject: Pool Compliance: Building Act and Code – With a legal viewpoint summation

The following is a summation of a review of the comments made in Determination 2019-001 in regard to the alleged misuse of Swish Pool Access Safety Systems by home-owners.

The Determination rejected a client's application to overturn Auckland Council's rejection of their pool consent on the basis of the non-mandatory AS1 clause 4.2.1 which requires doors into the pool area to be of one panel and no wider than 1000mm

- MBIE advised Auckland Council AS1 was non-mandatory and couldn't be enforced
- Subsequently, MBIE's Determination decision then enforced AS1 4.2.1 - **Why?**
- To support their decision MBIE advised Swish slide door Systems did not meet the purpose and performance requirements of the legislation and NZBC F9 regulation
 1. The systems could be disconnected (*as can any system for door or gate*)
 2. The systems could be circumvented using a second panel to jamb the door open
 3. An uncontrolled close could cause a SelfLatch to fail - *as could any door/gate latch!*

Swish rejected the Determination findings throughout the review process on the basis of:

- The Swish fourteen year history of successfully modifying door-sets with pool access
- Without any child drownings where any of the Swish systems were installed
- With all systems installed being approved as pool compliant by Territorial Authorities

The Building Act 2004 section 162A stipulates:

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*

162C: Residential Pools must have a means of restricting access

- (1) *Every residential pool that is filled or partly filled with water must have a physical barrier that **restricts access to the pool by unsupervised children** under 5 years of age*
- (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 property in or on which the pool is situated
 - e. If subject to hire purchase, the purchaser of the pool
 - f. If the pool is subject to a lease or is part of the premises subject to a lease, the lessee of the pool or the premises



NZBC Clause F9 – Means of restricting access to residential pools

F9.1 Objective:

The objective of this provision is to prevent injury or death to young children involving residential pools.

F9.3-1 Performance:

*Residential pools must have or be provided with physical barriers that **restrict access to the pool or the immediate pool area by unsupervised young children under 5 years.***

(Acknowledging the stipulated limits on application – Small Heated Pools – F9.3.1 & F9.3.2)

F9.3.3 Performance:

A barrier surrounding the pool must have no permanent objects or projections **on the outside** that could assist children in the negotiating of the barrier.

Any gates must –

- (a) Open away from the pool
- (b) Not be able to be readily opened by children
- (c) Automatically returned to the closed position after use

F9.3.4 Performance:

Where a building forms all or part of an 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) Close automatically after use

Conclusion:

To determine the **effectiveness of all and any pool barrier**, child drowning statistics should be considered to provide factual guidance to the authority:

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				Average per year	Comments
	Isolation Fencing & gates	Doors bolted **	Doors Swish modify	Total child pool drowning		
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
Subtotal	121	20	0	141	5.5	Statistic before Swish systems introduced 2015
						** Doors - bolted or unmodified:
2007 -2012	23	2	0	25	5	Ex Water Safety NZ statistics and confirmed by MBIE
2013	4	0	0	4	4	during the "make pool compliance easier" program 2016
2014	3	0	0	3	3	
2015	2	0	0	2	2	
2016	1	0	0	1	1	
2017	6	1	0	7	7	
2018	3	0	0	3	3	
Subtotal	42	3	0	45	4	Statistic after Swish systems introduced 2015
Total	163	23	0	186	5	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



To bring the graph into statistical perspective, based on the same number of pool installations being completed for all barrier types discussed, the 2007 through 2018 child drowning result potentially was:

- Fence between house and pool = 2 child deaths
- Un-modified door-sets = 1 child death
- Swish modified door-sets = 0 (zero) child deaths

- *The converse is also statistically and potentially true*
- Had all pools had Swish modified door-sets between house and pool
- **An average of 4 children a year could have been saved from drowning**

Therefore, MBIE / Auckland council apparently attempting to enforce “isolation fencing” by default by discrediting Swish Pool Access Safety Systems in the process, are indeed, **“materially increasing the danger to children of drowning in the home pool”**

Summation:

The following is summation of Swish advice to NZPIA, various BCA’s and MBIE during 14 months of this Determination process.

These matters have also been brought to the attention of the MBIE CEO and DCEO in an effort to reverse the error-ridden findings of Determination 2019-001.

The Swish objective is to re-establish the rule of pool compliance legislation, to eliminate unsupported opinion and interpretation and the non-mandatory AS1 schedule. Swish also intend to have removed from the Determination and pool consent process, all unsupported allegations of MBIE and Auckland Council inferring “Swish systems have been designed to be disconnected” as they *have not been substantiated by any facts – Refer to Pool Barrier – Child drowning table*

Swish confirm, all its Pool Access Safety Systems meet:

The Purpose:

- To provide a barrier around the home pool and pool area by modifying door-sets to:
- *To prevent children aged 5 years and under **gaining unsupervised access to a home pool or pool area***

- **Swish advise:**
- Pool Access Safety Systems are not designed to prevent **actions of irresponsible adults** circumventing door-set operation or disconnecting the systems.
- (Responsible use of any building system or feature, is an inherent expectation in the Building Code as it is in any rule or law)
- *Refer to the Pool barrier – Child drownings table*

The Performance:

- The performance required in the Act and regulations are defined as:
- When the walls of a dwelling provide part or all part of the barrier
- All door-sets shall be self-latching at 1500mm above the internal floor



- The door leaf / panel must be self-closing or
- Be alarmed at to warn adults the barrier has been breached
- *Thereby, **preventing pool access by unsupervised children aged 5 years and younger***
- **Swish advise:**
- Swish Pool Access Safety Systems *are not designed to prevent the actions of irresponsible adults* circumventing or disconnecting the operation of the systems.
- (Any safety feature must depend on the correct intended use being applied by a supervising adult which is the inherent expectation in any rule or law)
- *Refer to the Pool barrier – Child drowning table and statistical perspective*

The Responsibilities: Building Act 2004 – 162C – (4)

- **Note:** Peoples responsible actions are an inherent expectation in the code *but are not controlled by the code in any way*
- *The following people **must ensure compliance** with this section;*
 - *The owner of the pool*
 - *The pool operator*
 - *The owner of the land on which the pool is situated*
 - *The occupier of the property on which the pool is situated*
 - *If the pool is under hire purchase, the purchaser of the pool*
 - *The lessee of the pool or the premises*
- **Swish advise:**
- *Pool Access Safety Systems are not designed to prevent actions of irresponsible adults circumventing or disconnecting the systems*
- **Note:**
- *Refer to the Swish Product Technical Statement: Design (approved by Auckland Council) which clearly advises under the conditions Product / System Warranty:*
- **Item 3. Exclusion:** *For any liability for **ensuring continued compliant use** of the systems in regard to the prevention of child drownings under current legislation, the Building Act 2004 and regulation NZBC F9.*
- *This clause has been accepted in this document (since October 2016) and its earlier version approved by Auckland Council (since July 2008) without any adverse comment*
- *All pool consents to date have been approved on installation, without exception*

Legal opinion:

1. **Actions of people** in using building systems / features or “building work” are not covered by the Building Code other than by an inherent expectation (as in any act of law or any rule) that people will act appropriately to ensure the law or rule is complied with.
2. **Nothing in the Building Code** indicates that the actions of people should be taken into account in any way, or whether such actions should contribute to whether or not such “building works” **in use**, comply with the code.



3. **If a BCA were to be legally obliged** to take into account the manner in which “building work” will be used by people, then it would become impossible for any BCA to process and /or approve without forming a personal opinion or asking for a documented assessment of the applicant’s (home-owners) potential reliability.
(Exception in 162C (4)) as relevant to who ensures continued pool compliance)

Which takes us back to the Page 2: *Pool Barriers – Child drowning table* which clearly takes out of the discussion / decision process “*any unsubstantiated opinion*” and replaces it with “*opinion substantiated by researched facts*”.

Swish will continue to request their clients demand all pool consent rejections provided by BCA’s are supplied in writing. The reason for the rejection must be precisely referenced to the appropriate statute, regulation and clause(s), the consent application is considered to be in breach of...

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