

Compliance Issues for Swimming Pool Barriers

By Tim Beckett

Background

Swimming pool inspections represent a significant compliance issue and potential source of risk, for local governments. The nature of that risk and the obvious public interest in ensuring the security of swimming pool barriers has resulted in increasing penalties for non-compliance.

In April 2019, the *Building Regulations 2012 (Regulations)* were amended to, among other things, increase the modified penalty for non-compliant swimming pool barriers to \$1,000. Under regulation 50(1) of the Regulations, an owner or occupier of a property who fails to maintain a barrier which complies with the Regulations and the relevant Australian Standards and/or Building Code provisions commits an offence which carries a maximum penalty of \$5,000.

The recent increase in the modified penalty for that offence, along with recent significant penalties imposed in Magistrates Court prosecutions for these offences, has underpinned the importance of maintaining compliant swimming pool barriers.

Inspection and enforcement

Regulation 53(1) of the Regulations provides that local governments must arrange for private swimming pool barriers to be inspected at intervals of no more than 4 years. Where a local government fails to carry out inspections on that basis, the local government will be exposed to potential liability in the event of injury or death arising from a non-compliant private swimming pool barrier. Similarly, in circumstances where a local government is aware, or should reasonably be aware, that a private swimming pool barrier is non-compliant and that local government fails to take reasonable measures to address that risk, the local government will be exposed to potential liability in relation to that risk.

Accordingly, it is essential that local governments can demonstrate that an appropriate and effective inspection regime is being applied and that, where necessary, a local government is taking appropriate enforcement action to address non-compliant barriers. That enforcement action may include a combination of inspections, warnings, infringement notices, prosecutions and building orders.

Entry and inspection

Section 100 of the *Building Act 2011 (Act)* establishes broad powers for local governments to enter and inspect properties for compliance purposes. Authorised persons are entitled to enter private properties, other than parts of properties in use as a 'residence', to inspect swimming pool barriers and take photographs if necessary. The reference to 'residence' in the Act does not, in our view, prevent authorised persons from entering (for example) the rear yard of a private property. Instead, authorised persons are only prevented from entering dwellings without the consent of the occupier of that dwelling. In

circumstances where officers are unable to physically gain access to private swimming pools, or require access to or through a dwelling in order to carry out an inspection, sections 106-109 of the Act establish a process for obtaining and executing warrants for that purpose.

When carrying out inspections, officers should be aware of the outcome of any previous inspections of the relevant property and should be aware of the relevant standards for the swimming pool barrier, by ascertaining whether the relevant swimming pool is a pre-November 2001 pool, a pre-May 2016 pool or a post-May 2016 pool. As part of the inspection process, authorised persons should take photographs, complete relevant inspection reports, and discuss any compliance issues with owners/occupiers of the relevant premises.

Non-compliant barriers

There is no requirement for warnings to be given by a local government before taking enforcement action in relation to non-compliant swimming pool barriers. In our experience, the courts have effectively embraced a 'zero tolerance' approach in relation to swimming pool compliance and there is a general understanding that owners and occupiers of properties containing swimming pools have an obligation to ensure that they are aware of the relevant standards and comply with those requirements irrespective of whether any warnings have been given.

In most cases, local governments will give some warning before taking enforcement action of any kind. However, in circumstances where breaches are either persistent or can be characterised as high risk, it is appropriate that local governments take formal enforcement action as the failure to do so may not adequately address any risk associated with the pool and may expose a local government to liability.

In circumstances where warnings have not resolved compliance issues, local governments can issue infringement notices, commence prosecutions, and/or serve formal building orders under section 110 of the Act.

Enforcement options

An infringement notice carries a modified penalty of \$1,000 and is an appropriate mechanism for dealing with a discrete offence under regulation 50(1) of the Regulations. However, infringement notices should only be issued where there is sufficient evidence to support a prosecution (if necessary) and, ordinarily, in circumstances where the relevant breach is not ongoing.

Where breaches are deemed to constitute a high risk or are ongoing, it may be more appropriate to commence prosecutions for that breach. Between May 2019 and July 2019, McLeods acted in three separate swimming pool prosecutions which proceeded to trial in the Midland Magistrates Court, resulting in penalties and costs of \$5,400, \$7,000 and \$8,500 respectively. Regardless of the extent of the non-compliance, courts typically treat swimming pool offences as being very serious, having regard to the potential risks associated with non-compliant barriers.

In circumstances where breaches are considered to be extremely persistent or constitute a high risk or emergency, it may also be appropriate for local governments to serve building orders requiring works to be carried out or, alternatively, swimming pools to be drained. The failure to comply with a building order carries a maximum penalty of \$50,000 and the courts have again demonstrated a willingness to impose significant penalties for offences of that kind.



Conclusion

It is essential that local governments implement effective and regular inspection regimes for swimming pool barriers to comply with the requirements of the Regulations. Furthermore, in circumstances where non-compliant barriers are not remedied within a reasonable timeframe, local governments may have a duty to take appropriate enforcement action as a failure to do so may result in death or injury, for which a local government may bear some responsibility.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information please contact Tim Beckett by email to tbeckett@mcleods.com.au.