

# **Regulatory Impact Statement**

## **Fencing of Swimming Pools Act 1987**

### **Modifications to Cabinet decisions**

#### **Agency Disclosure Statement**

This Regulatory Impact Statement (RIS) has been prepared by the Construction Market Policy team in the Ministry of Business, Innovation and Employment (MBIE).

The Fencing of Swimming Pools Act 1987 (the Act) helps to protect young children from drowning by requiring owners to fence certain pools.

In November 2013, Cabinet agreed to amend the Act to reduce compliance costs while maintaining the safety of young children. Officials have reviewed aspects of the November 2013 decisions, and considered options for the depth below which pools will be exempt from the Act, and the enforcement powers needed to ensure that people remedy breaches of the Act.

This RIS assesses the likely effects of the options on the objectives of reducing the risk of drowning, compliance costs for pool owners and administrative costs for councils, and increasing certainty and consistency. The recommended options in this RIS are expected to improve certainty and consistency, while having no significant effect on the risk of drowning, compliance costs or administrative costs.

The effects of the options discussed in this RIS depend on assumptions about how parties would respond to the changes described in each option. MBIE considers the analysis in this RIS provides a reasonable indication of the nature and significance of the effects of the options analysed.

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## Context

- 1 The Fencing of Swimming Pools Act 1987 (the Act) aims to protect young children from drowning in home pools by requiring certain pools to be fenced. Children aged 0-4 years have drowned when they had unsupervised access to a home pool (often they were with their caregivers inside the house before going to the pool unnoticed).<sup>1</sup> Drowning of young children in home swimming pools has reduced from 100 drownings over a ten-year period before the Act was introduced, to 30 drownings over the ten years to 2012.
- 2 In March 2013, MBIE published a consultation document with proposals to reduce compliance and administrative costs associated with the Act, while keeping young children safe.
- 3 In November 2013, Cabinet decided to amend the Act to reduce compliance costs to pool owners and territorial authorities (councils) while maintaining the safety of young children [EGI Min (13) 28/9]. MBIE published a regulatory impact statement (the November 2013 RIS) assessing the proposals in the Cabinet paper.<sup>2</sup>
- 4 A Bill is currently being drafted to give effect to Cabinet's decisions. Alongside the drafting process, officials have reviewed aspects of the November 2013 decisions, in particular the decisions that:
  - the Act will not apply to pools containing less than 300mm of water (currently the Act does not apply to pools containing less than 400mm of water)
  - the existing prosecutable offences in the Act will be replaced with infringement offences.
- 5 This RIS contains analysis relating to the decisions referred to in paragraph 4 above.

## Objectives

- 6 This RIS uses the same objectives as the November 2013 RIS. The November 2013 RIS noted that the overall objective of the policy proposals was to:

“... maintain the effectiveness of the Act in reducing drownings of young children, while reducing compliance and administrative costs for pool owners and councils.”<sup>3</sup>
- 7 The specific objectives used to assess the options in this RIS are:
  - reducing the risk of young children drowning as a result of gaining unsupervised access to pools
  - reducing compliance costs for pool owners (including the cost of installing a means of restricting access, the cost of interacting with the council, and the economic cost associated with changing behaviour in order to comply with the Act)
  - reducing administrative costs for councils (including education, inspection, and enforcement costs)
  - improving certainty for owners or councils relating to their obligations, and improving consistency in the way the Act is administered.

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<sup>1</sup> Based on data from Water Safety New Zealand's DrownBase.

<sup>2</sup> The November 2013 Cabinet paper, Minute and RIS are available at [www.building.govt.nz/fospa-index](http://www.building.govt.nz/fospa-index)

<sup>3</sup> See page 8 of the November 2013 RIS.

- 8 This RIS uses the same scale that the November 2013 RIS used to show the relative size of the expected effect of each option.

Scale	Likely effect
✓✓✓	Significant improvement
✓✓	Moderate improvement
✓	Small improvement
No significant change	No change, or a slight (but insignificant) change
×	Small deterioration
××	Moderate deterioration
×××	Significant deterioration

- 9 Where we expect an option to cause a slight change, even though the change is not significant overall, we have nevertheless indicated the direction along the scale of that slight change.

## Problem 1 – Depth below which pools are exempt

### Status quo

- 10 The Act currently requires owners to fence swimming pools (including portable pools), but pools containing less than 400mm of water are exempt from this requirement.
- 11 Although we estimate the risk of drowning in temporary portable pools to be lower than in permanent swimming pools,<sup>4</sup> when portable pools are left filled with water they pose a potential risk to young children. Best practice is to empty temporary portable pools and store them away after each use.
- 12 In November 2013, Cabinet agreed to exempt portable pools containing less than 300mm of water from the Act.<sup>5</sup> This change was aimed at strengthening the safety message that people should empty temporary portable pools after each use. Pools containing less than 300mm of water are usually practical to empty after each use, while people often leave portable pools containing more than 300mm of water filled temporarily (rather than emptying them after each use). Australian pool safety regulations also use a 300mm depth threshold.
- 13 When Cabinet's decisions were announced on 28 November 2013, the public commentary suggested that the changes to the Act would require 'paddling pools' to be fenced – referring specifically to Cabinet's decision that the Act would apply to portable pools containing more than 300mm of water (rather than 400mm currently).
- 14 The former Minister for Building and Construction directed officials to consider options where the Act would not apply to temporary portable pools, while still applying to portable pools that remain filled for long periods.



Figure 1: A portable pool that contains slightly less than 300mm of water.



Figure 2: A portable pool with approximately 400mm of water.

### Problem definition – Depth below which pools are exempt

- 15 This RIS considers the following problem arising from applying the requirements of the Act to pools containing between 300mm and 400mm water:
- councils would be likely to find it difficult to enforce the requirements for these pools (we understand that councils currently find it difficult to enforce the Act in relation to portable pools)
  - applying the Act to these pools would be unlikely to be widely supported by the public
  - owners of these pools would be unlikely to comply with the requirements (we understand that there is widespread non-compliance with the Act in relation to portable pools).

<sup>4</sup> See page 5 of the November 2013 RIS. Four children aged 0-4 years drowned in temporary paddling pools in the 20 years to 2012 (data from Water Safety New Zealand's DrownBase). In comparison, 100 young children drowned in permanent swimming pools in a ten-year period before the Act was introduced (see Local Bills Committee (1983) *Report on the Fencing of Private Swimming Pools*, AJHR I(10A)). We estimate the number of temporary paddling pools to be greater than the number of permanent swimming pools. Clarification: The November 2013 RIS reported that 5 per cent of young children drowned in portable pools. The figure of 5 per cent relates to temporary paddling pools.

<sup>5</sup> See the November 2013 Cabinet Minute (EGI Min (13) 28/9), paragraph 12.4.

## Description of the options – Depth below which pools are exempt

- 16 This RIS analyses the following options, relative to the November 2013 decision to reduce the depth threshold from 400mm to 300mm:
- Option 1.1 (**recommended**): the Act will not apply to pools containing less than 400mm of water (the existing requirement of the Act)
  - Option 1.2: the Act will not apply to pools that are not fitted (or designed to be fitted) with filtration systems, and contain less than 600mm of water.

### Analysis of Option 1.1 (recommended): the Act will not apply to pools containing less than 400mm of water (the existing requirement of the Act)

- 17 Under Option 1.1, Cabinet's previous decision would be rescinded and the depth threshold in the Act would remain at its existing level of 400mm. Some overseas jurisdictions (e.g. California) have a similar depth threshold in their pool fencing regulations.
- 18 An analysis of Option 1.1, relative to the November 2013 decision, is set out in Table 1.

**Table 1 – Effect of Option 1.1**

<b>Risk of drowning</b>
<p><b>Not expected to significantly affect risk (could slightly increase)</b></p> <p>The November 2013 RIS estimated that reducing the depth threshold from 400mm to 300mm would reduce the current risk of drowning slightly (but not significantly).<sup>6</sup></p> <p>We expect Option 1.1 (a 400mm depth threshold) would increase the risk of drowning slightly (but not significantly), relative to a 300mm depth threshold. We expect a slight increase in risk because we understand people often leave pools containing between 300mm and 400mm of water filled temporarily. We understand there is currently widespread non-compliance with the Act in relation to portable pools, and we expect the change in the depth threshold would have little effect on which portable pools many people use. Nevertheless, if the depth threshold was 400mm (rather than 300mm), we expect slightly more people would use pools containing between 300mm and 400mm of water.</p> <p>We do not expect Option 1.1 would lead to a significant increase in the overall risk of young children drowning in pools, because we expect the increase in the use of pools between 300mm and 400mm of water would be small relative to the total number of portable pools.</p>
<b>Compliance costs</b>
<p><b>Not expected to significantly change costs (could slightly reduce)</b></p> <p>The November 2013 RIS estimated that reducing the depth threshold to 300mm would not change compliance costs, but it would influence some people to limit themselves to pools containing less than 300mm of water. Limiting people's choices is a form of compliance cost.</p> <p>Using the same analysis as in the November 2013 RIS, we expect that Option 1.1 would reduce compliance costs (but not significantly) because Option 1.1 (a depth threshold of 400mm) would limit people's choices by less than if the depth threshold was 300mm.</p>

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<sup>6</sup> See page 31 of the November 2013 RIS.

**Table 1 – Effect of Option 1.1**

<b>Administrative costs</b>
<p><b>Not expected to significantly change costs (could slightly reduce)</b></p> <p>The November 2013 RIS estimated that reducing the depth threshold from 400mm to 300mm would not significantly change administrative costs, because we understand that councils currently incur little costs relating to portable pools. Reducing the depth threshold to 300mm could increase administrative costs slightly because there is the potential that councils would incur costs from time to time, for example if they receive a complaint about a portable pool containing between 300mm and 400mm of water.</p> <p>Using the same analysis as in the November 2013 RIS, we expect Option 1.1 (changing from 300mm to 400mm) to have no significant effect on administrative costs. Option 1.1 could reduce administrative costs slightly (relative to the November 2013 decision) because councils would not need to take enforcement action in relation to portable pools containing between 300mm and 400mm of water.</p>
<b>Certainty and consistency</b>
<p>✓ <b><i>Expected to increase certainty</i></b></p> <p>The November 2013 RIS did not specifically assess the effect on certainty and consistency of applying the requirements of the Act to portable pools containing between 300mm and 400mm of water.</p> <p>Measures to enforce the Act for portable pools are likely to be less cost-effective than for permanent swimming pools. We understand that councils find it difficult to enforce the Act in relation to portable pools because councils find these pools difficult to locate, and we estimate the risk of drowning in portable pools is lower than in permanent swimming pools. Nevertheless, councils face potential risks associated with their decisions about how to enforce the obligations of the Act relating to portable pools – a court or coroner could potentially find a council has not taken all reasonable steps to ensure that owners comply with the Act.</p> <p>We understand that owners of portable pools often breach the Act by leaving their pools filled with water. These owners face uncertainty about the extent of any enforcement action, because it would depend on the approach councils take to enforcing the Act. These owners also face the risk that a young child drowns in their pool and a court or coroner finds that they contributed to the drowning by not complying with the Act.</p> <p>The November 2013 decision to reduce the depth threshold to 300mm would introduce a new cohort of pools (portable pools containing between 300mm and 400mm of water) for which councils would face potential risks associated with their decisions about how to enforce the obligations of the Act, and for which owners would face uncertainty about the extent of any enforcement action. Although the November 2013 decision would support the safety message that temporary portable pools should be emptied after each use, we expect a change in the depth threshold to 300mm would have relatively little effect on the behaviour of owners of portable pools, and no significant effect on the risk of young children drowning.</p> <p>Option 1.1 (a 400mm depth threshold) would avoid the risks for councils and pool owners (discussed above) associated with pools containing between 300mm and 400mm of water, while being estimated to have no significant effect on the risk of drowning (relative to a 300mm depth threshold). Under Option 1.1, there would continue to be risks for pool owners and councils arising from applying the Act to portable pools containing more than 400mm of water. However, these pools are less practical to empty after each use (and often have a filtration system to enable the pool to remain filled for long periods).</p> <p>This RIS finds no compelling reason to change the existing depth threshold in the Act. Continuing to use the existing depth threshold (i.e. Option 1.1) provides consistency (for example, for those pool owners who have made choices based on the existing depth threshold).</p>

## Analysis of Option 1.2: the Act will not apply to pools containing less than 600mm of water and are not fitted (or designed to be fitted) with filtration systems

19 Option 1.2 would exempt pools containing less than 600mm of water unless they have a filtration system. Florida is an example of an overseas jurisdiction with a similar depth threshold. South Australia is a jurisdiction that exempts pools with no filtration system. Filtration systems are usually essential for keeping the water clean when pools remain filled for long periods.

20 Option 1.2 seeks to ensure that the Act applies only to pools designed to be left filled for long periods. We understand that most pools designed to contain more than 600mm of water have a filtration system. Some pools containing less than 600mm of water also have filtration systems.

21 An analysis of Option 1.2, relative to the November 2013 decision to reduce the depth threshold from 400mm to 300mm, is set out in Table 2.



**Table 2 – Effect of Option 1.2**

<b>Risk of drowning</b>
<p><b>Not expected to significantly affect risk (slight increase in risk)</b></p> <p>For similar reasons as discussed in Table 1, we expect Option 1.2 would lead to a slight increase in the risk of drowning, relative to the November 2013 decision. We expect a slight increase in risk because we understand people often leave pools containing between 300mm and 600mm of water filled temporarily. We expect the change in the depth threshold would have little effect on which portable pools many people use. Nevertheless, if the depth threshold was 600mm (rather than 300mm), we expect slightly more people would use pools containing between 300mm and 600mm of water.</p> <p>We expect the risk of drowning would be slightly higher than for Option 1.1 because we expect that, if the depth threshold was 600mm (rather than 400mm), slightly more people would use pools containing between 400mm and 600mm of water.</p>
<b>Compliance costs</b>
<p><b>Not expected to significantly change costs (could slightly reduce)</b></p> <p>For similar reasons as discussed in Table 1, we expect Option 1.2 would reduce compliance costs (but not significantly) relative to the November 2013 decision.</p> <p>We expect Option 1.2 would reduce compliance costs by more than Option 1.1 because Option 1.2 (a depth threshold of 600mm) would limit people's choices by less than Option 1.1 (a depth threshold of 400mm).</p>
<b>Administrative costs</b>
<p><b>Not expected to significantly change costs</b></p> <p>For similar reasons as discussed in Table 1, we expect Option 1.2 would have no significant effect on administrative costs relative to the November 2013 decision. Administrative costs could reduce slightly because councils would not need to take enforcement action in relation to portable pools containing between 300mm and 600mm of water. However, administrative costs could increase slightly because councils would need to consider whether or not portable pools are fitted (or designed to be fitted) with filtration systems.</p>

**Table 2 – Effect of Option 1.2**

<b>Certainty and consistency</b>
<p>✓ <b>Expected to increase certainty</b></p> <p>For similar reasons as discussed in Table 1, we expect that Option 1.2 would lead to greater certainty than the November 2013 decision. Option 1.2 would not impose obligations (and the risks associated with breaching those obligations) on councils and on owners of pools containing between 300mm and 600mm of water, where those obligations are unlikely to significantly change the risk of drowning.</p> <p>We do not expect that Option 1.2 would create as much certainty as Option 1.1. While both Options 1.1 and Option 1.2 avoid applying the Act to temporary portable pools, Option 1.2 would be more complex because it requires people to consider whether a pool is fitted (or designed to be fitted) with a filtration system.</p>

### **Conclusion and recommendation – Depth below which pools are exempt**

- 22 Table 3 summarises the assessment of Options 1.1 and 1.2, relative to the November 2013 decision. For each criterion, the most favourable option is shaded.

**Table 3 – Summary effects of options relative to the November 2013 decision**

	<b>November 2013 decision</b> The Act will not apply to pools containing less than 300mm of water	<b>Option 1.1 (recommended)</b> The Act will not apply to pools containing less than 400mm of water	<b>Option 1.2</b> The Act will not apply to pools that are not fitted (or designed to be fitted) with filtration systems, and contain less than 600mm of water
Risk of drowning	-	Not expected to significantly affect risk (could slightly increase)	Not expected to significantly affect risk (slightly greater increase than Option 1.1)
Compliance cost	-	Not expected to significantly change costs (could slightly reduce)	Not expected to significantly change costs (slightly greater decrease than Option 1.1)
Administrative cost	-	Not expected to significantly change costs (could slightly reduce)	Not expected to significantly change costs
Certainty and consistency	-	Expected to increase certainty	Expected to increase certainty (slightly less than Option 1.1)

- 23 MBIE recommends Option 1.1. Option 1.1 would not impose obligations (and the risks associated with breaching those obligations) on councils and on owners of pools containing between 300mm and 400mm of water. These pools are usually practical to empty after each use, and we expect that imposing these obligations would not significantly change the risk of drowning.
- 24 Option 1.1 is preferred to Option 1.2 because the above analysis concludes there is no compelling reason to change the existing depth threshold (Option 1.1 reflects the existing depth threshold).

## Problem 2 – Ensuring that people remedy breaches

### Status quo

- 25 Under the Act, pool owners must install a fence that complies with the building code, and must maintain the fence so that it continues to comply with the building code at all times. Councils can prosecute owners who breach this requirement, and a court can order them to drain the pool and pay a fine of up to \$500 plus up to \$50 per day the breach has occurred. On rare occasions, a court has imposed criminal penalties on owners who were found to be in breach of the Act when a young child drowned in their pool.
- 26 Councils are usually able to encourage owners to remedy breaches without having to prosecute them. Councils have advised that prosecutions are not a cost-effective way of addressing breaches of the Act.
- 27 In November 2013, Cabinet agreed to remove the current prosecutable offences in the Act, and replace them with:
- notices requiring people to remedy breaches
  - an infringement offence with a fee of \$500 for not complying with the notice to remedy the breach.<sup>7</sup>
- 28 The November 2013 RIS assessed the effect of these enforcement powers:
- “We expect an infringement regime to provide more timely and efficient options for councils to use when necessary. We expect councils will continue to take an educative approach and encourage voluntary compliance in the first instance.”<sup>8</sup>
- 29 We expect councils will seldom need to use these enforcement powers. We also expect that, where councils discover a breach of the Act, councils would succeed (as they do currently) in encouraging owners to comply with the Act.
- 30 We expect that, in the few cases where councils cannot encourage owners to comply with the Act, councils would issue a notice to remedy the breach. We expect that these notices will almost always be complied with. If, however, an owner fails to comply with a notice, councils could issue an infringement notice, and would also issue a further notice to remedy the breach. This process of issuing notices would continue until the owner remedies the breach. Faced with a potential series of notices (and infringement fees), we expect it would be rare for a pool owner not to remedy the breach.

### Problem definition – Ensuring that people remedy breaches

- 31 As part of the process of drafting the Bill, officials have considered the problem that a person might not remedy a breach despite facing a series of notices and infringement fees. We expect that this would be rare, but it might occur if a person had a substantial amount of unpaid fines already (for example, for traffic offences), and additional infringement fees have no effect on their behaviour. Below, this RIS considers an option to address this problem.

### Description of the options – Ensuring that people remedy breaches

- 32 This RIS analyses the following option relative to the November 2013 decision relating to offences:
- Option 2.1 (**recommended**): prosecutable offence with a fine not exceeding \$5000 for failing to comply with a notice to remedy a breach of the pool safety obligations.
- 33 Under Option 2.1, prosecutable offences would be in addition to the enforcement tools agreed to in November 2013 (notices to remedy a breach, and infringement offences).

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<sup>7</sup> See November 2013 Cabinet Minute (EGI Min (13) 28/9), paragraph 8.2.

<sup>8</sup> See November 2013 RIS, paragraph 54.

## Analysis of Option 2.1

34 An analysis of Option 2.1, relative to the November 2013 decision, is set out in Table 4.

**Table 4 – Effect of Option 2.1**

<b>Risk of drowning</b>
<p><b>Not expected to significantly affect risk</b></p> <p>We expect Option 2.1 would have no significant effect on the risk of drowning, relative to the November 2013 decision. Under the November 2013 decision, we expect it would be rare that a pool owner would not remedy a breach of the Act. Option 2.1 could help to ensure that the breach is remedied in the rare case where an owner fails to respond to a series of notices and infringement fees. However, we expect that bringing these few pools into compliance with the Act would have a negligible effect on the overall risk of young children drowning in pools.</p>
<b>Compliance costs</b>
<p><b>Not expected to significantly change costs</b></p> <p>If prosecutions were taken under Option 2.1, the court process would involve costs for the pool owners. Given that we expect prosecutions would occur rarely, we expect the overall increase in compliance costs would be negligible.</p>
<b>Administrative costs</b>
<p><b>Not expected to significantly change costs</b></p> <p>If prosecutions were taken under Option 2.1, there would be administrative costs for councils associated with the court process, but there could also be administrative savings from not having to issue notices to remedy a breach and infringement notices. We expect prosecutions would be rare, and therefore any change in administrative costs would be negligible.</p>
<b>Certainty and consistency</b>
<p>✓ <b>Expected to improve certainty and consistency</b></p> <p>Option 2.1 is likely to create greater assurance that breaches will be remedied, because in rare situations where notices to remedy a breach (and infringement notices) are insufficient, the courts could order the person to remedy the breach (in addition to imposing a fine).</p> <p>Option 2.1 would improve consistency between the approach to enforcing requirements under the Act, and enforcing requirements under the Building Act 2004. Both Acts impose obligations on owners to comply with the building code, with the safety of people being a primary objective of the requirements.</p>

## Conclusion and recommendation – Ensuring that people remedy breaches

35 MBIE recommends Option 2.1 (prosecutable offences for breaches of the Act). These prosecutable offences would be in addition to the powers agreed to in November 2013 (notices to remedy a breach, and infringement offences). Option 2.1 is likely to create more certainty that breaches of the Act will be remedied in circumstances where people do not respond to infringement fees. We expect Option 2.1 would have no significant effect on the risk of drowning, compliance costs or administrative costs because prosecutions are expected to be rare.

## Consultation

- 36 The November 2013 RIS was informed by submissions on a consultation document in 2013 that sought feedback on proposals to change the Act, including submissions from safety groups, the pool industry, councils, and individuals.<sup>9</sup> Proposals to address Problem 1 and Problem 2 in this RIS have been informed by subsequent discussions with water safety groups and councils.
- 37 The following agencies have been consulted on this RIS: Ministry of Health, Accident Compensation Corporation, Ministry of Justice, Department of Internal Affairs, The Treasury, Ministry of Education and Ministry of Social Development.

## Conclusions and recommendations

- 38 MBIE recommends the following proposals:
- Option 1.1: the Act will not apply to pools containing less than 400mm of water (instead of 300mm agreed by Cabinet in November 2013)
  - Option 2.1: prosecutable offence with a fine not exceeding \$5000 for failing to comply with a notice to remedy a breach of the pool safety obligations (in addition to the powers agreed to in November 2013, of notices to remedy breaches, and infringement offences).
- 39 These options are likely to have no significant effect on the risk of drowning, compliance costs or administrative costs, mainly because they affect relatively few pools. However, they are likely to improve certainty and consistency because:
- Option 1.1 would not impose obligations (and the risks associated with breaching those obligations) on councils and on owners of pools containing between 300mm and 400mm of water. These pools are usually practical to empty after each use, and we expect that imposing these obligations would not significantly change the risk of drowning
  - Option 2.1 is likely to create more certainty that breaches of the Act will be remedied in circumstances where people do not respond to infringement fees.

## Implementation

- 40 The proposals assessed in this RIS will be included in a Bill to make legislative changes to implement Cabinet's decisions relating to the Fencing of Swimming Pools Act 1987. The operational infrastructure to implement the proposals is currently in place.

## Monitoring, evaluation and review

- 41 The proposals assessed in this RIS would not be monitored specifically, mainly because they are not expected to have a significant effect on the risk of drowning or on compliance or administrative costs. The proposed approach to monitoring described in the November 2013 RIS is likely to identify any significant issues that arise after the proposals are implemented.<sup>10</sup>

## Endnotes

**Figure 1:** Intex Mini-frame pool. Intex Development Limited. Available at: <http://www.intexdevelopment.com/index.php/home/wetset/kids-pools/panel-frame-pools/57173np.html>

**Figure 2:** Bestway inflatable kids pool. Bestway Swimming Pools (UK). Available at: <http://www.bestwayswimmingpools.co.uk/product/260/disney-cars-fast-set-portable-pool>

**Figure 3:** Bestway above-ground pool. Bestway Swimming Pools (UK). Available at: <http://www.bestwayswimmingpools.co.uk/product/27/bw57109-10ft-clear-fast-set-pool-set>

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<sup>9</sup> A summary of submissions is available at [www.building.govt.nz/fospa-index](http://www.building.govt.nz/fospa-index)

<sup>10</sup> See page 44 of the November 2013 RIS.