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6 September 2019

Director, Building Policy
Department of Environment, Land, Water and Planning
8 Nicholson Street
East Melbourne VIC 3002

By email: building.policy@dewlp.vic.gov.au

Dear Director,

Swimming Pool Regulations RIS 2019

The Law Institute of Victoria (**LIV**) welcomes the opportunity to provide input to the Department of Environment, Land, Water and Planning on the proposed *Building Amendment (Swimming Pool and Spa) Regulations 2019* (**Regs**).

The below submission provides specific feedback in relation to questions provided on the Engage Victoria Website and the Regulatory Impact Statement.

1) Answers to Questions from the Engage Victoria Website

Question1: Do you support the mandatory registration of all private swimming pools and spas?

The LIV supports mandatory registration in principle on the basis that it is intended to substantially reduce the number of children dying or being seriously injured as a result of drowning in private swimming pools and spas.

Question 2: Are the proposed fees that owners must pay for registration and certificate lodgement reasonable?

The LIV does not consider itself qualified to respond to this question.

However, it does wish to express its concern that the level of penalties proposed in the Regs is unjustifiably high (for example, 10 or 50 penalty units in most instances). Some incidents of non-compliance justify a high penalty for example, Reg 147C for failing to provide a compliant swimming pool or spa barrier.

However, there are others which the LIV queries as follows:

- A penalty of 50 units (currently $8,621) applies under Reg 147H(2) to any occupier who fails to ensure that a gate in a swimming pool or spa barrier is kept closed.

The LIV queries how this can be enforced given that a municipal building surveyor (**MBS**) is unlikely to be at the premises constantly. The LIV also queries whether there are circumstances in which such a heavy penalty could be reduced or waived: for example, if the fault lies with unauthorised persons trespassing the occupiers property by entering the premises and causing the breach of the regulation by leaving the gate open without the owner's knowledge and/or consent.

- Page 9 of the *Building Amendment (Swimming Pool and Spa) Regulations 2019* Regulatory Impact Statement (**RIS**) indicates that an owner's failure to provide a certificate of pool and spa barrier compliance by the date required by the council will be a prescribed infringement offence subject to a fine of 2 penalty units (unless councils exercise their power to extend time required for lodgement of a certificate under certain circumstances). Assuming that this is Reg 147V, the prescribed number of penalty units in Reg 147V(1) is 10, rather than 2.

There are further references to penalties of 2 penalty units on pages 8 and 12 respectively of the RIS in relation to:

- failure to register new swimming pools and spas constructed after 14 April 2020 within 30 days of receipt of the relevant occupancy permit or certificate of final inspection; and

- failure to provide a certificate of pool and spa barrier compliance within a time period (not less than 14 days) nominated by the council by the date specified in a barrier improvement notice.

However, the Regs seem to envisage higher penalties of at least 10 penalty units. The LIV queries whether this is consistent with the statement on page 50 of the RIS that:

> "*The proposed Regulations create an escalating series of penalties beginning with an infringeable offence punishable by an on-the-spot fine of 2 penalty units ($330.44 in 2019-20) which will likely address the bulk of non-compliance, through to the powers available to council MBSs under Part 8 of the Building Act*."

The LIV further queries whether, in view of the likelihood that there will be widespread ignorance of the new Regs, until they are widely publicised (as is envisaged on page 50 of the RIS), there should be lower penalties for administrative or minor infringements and a sliding scale of penalties. The MBS would then have power to determine penalties for each specific instance of infringements.

<u>Question 3: Do you think the timeframes set out in the proposed regulations are reasonable?</u>

The LIV expresses strong concerns that there may be a last-minute rush to bring pools and spas into compliance and there will be insufficient suppliers and installers of pool barriers to satisfy the increased high-volume demand to comply with the regulations.

In addition, the high cost of installing barriers and of complying with the Regs may lead some owners to decommission their pools or spas, causing a demand for such work that cannot be met by tradespersons who currently have expertise in the correct procedure to undertake work as filling-in a swimming pool in the correct manner.

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The increased demand could prompt inexperienced tradesmen with no expertise to enter the market, to the detriment of consumers.

The LIV notes that Reg 147L envisages that the owners of land on which a swimming pool or spa was constructed prior to 14 April 2020 must apply to their local council to register their swimming pool or spa by 14 April 2020. Under Reg 147R, the next step is for the council to give written notice to the owner of various things, including the applicable barrier standard for the swimming pool or spa and the date by which the first certificate of pool or spa compliance (**Compliance Certificate**) must be lodged with council (this being the applicable date set out in the second dot point above).

For pools and spas constructed on or before 30 June 1994, this date is 30 October 2020. Page 6 of the RIS refers to a survey conducted by DELWP and the VMBSG in late 2018 which found that between approximately 80 and 90 per cent of pools and spas were found not to comply with the requirements for swimming pool and spa safety barriers. This suggests a very high level of non-compliance in the case of older pools and spas for which the compliance date is 30 October 2020.

The LIV suspects that the date of 30 October 2020 is too short a timeframe to require compliance for the following reasons:

- The RIS refers on page 6 to MBSs reporting that "resourcing constraints and competing priorities" often limit their ability to take proactive compliance action.

  The LIV queries whether the same constraints will lead to long delays in MBSs issuing the notices under Reg 147R, resulting in too short a timeframe before 30 October 2020 to enable owners to procure an inspection of their pool or spa and rectify any non-compliance (bearing in mind the high level of non-compliance referred to above).

- Although the Regs propose to create a new class of building inspector (pool safety) for inspecting and issuing certificates for pool barriers (**Pool Inspectors**), page 30 of the RIS states:

  > "*The VBA undertook a review of the existing training qualifications and competencies and determined that there is nothing currently in existence that provides relevant and sufficient knowledge to undertake the scope of work in inspection of swimming pool and spa safety barriers described by the proposed Regulations*";

  and

  > "*Although the course could not be finalised until the proposed Regulations are made later this year, initial planning and development could begin prior and it is anticipated that the training course could be settled by early 2020 with delivery beginning shortly thereafter*."

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However, page 30 also notes that:

> "*As the development of an accredited course typically takes between 12 – 18 months, there will not be enough time to develop a Victoria-specific accredited training course prior to the commencement of the new scheme. Ultimately, it is intended that the relevant qualification for the building inspector (pool safety) class is an accredited training course. However, the non-accredited training will serve as the eligibility requirement in the interim until the accredited course can be developed and rolled out*."

In view of the above and the requirement at Reg 17 to amend the *Building Regulations 2018* to require Pool Inspectors to have at least 6 months of practical experience, the LIV is concerned that there will be insufficient properly trained Pool Inspectors (as referred to in more detail at Question 4), to enable pools and spas to be inspected and brought into compliance by the required date.

Although Reg 147Z enables a council to extend time for lodgement of a Compliance Certificate, this appears to be entirely at the discretion of the MBS.

The LIV submits that the Regs should enable an appeal to the Building Appeals Board (**BCA**) on the basis that a refusal to extend time is unreasonable, such an appeal being on a similar basis to the appeal against the council's determination of the date of construction of the pool or spa referred to in Reg 147R(1)(d).

Similarly, the LIV submits that it should be possible to appeal to the BCA against any unreasonable determination under Reg 147S(1) that an MBS is not satisfied that a pool or spa no longer exists or no longer has the capacity to contain water that is more than 300mm deep.

Furthermore, in view of the likelihood that many owners may decide to remove their pools or spas from the register (or decommission them before they have to apply for registration), the LIV queries whether councils will be notifying landowners of the type of evidence that is required to be submitted to them under Reg 147S(1) and whether there will be a common or centralised approach from councils in this regard.

Form of Application for Registration

The LIV notes that an application for registration of a swimming pool or spa is required to be in Form 22 of the Regs. The LIV submits that:

- The Form 22 should only require the address of the land on which the swimming pool or spa is located in accordance with Reg 147J(1)(a).

  It should not contain the additional information set out in the exposure draft of the Form 22 (which includes lot & plan numbers and volume and folio), as this is not information which is known to most landowners without having to make further searches at increased cost to consumers. Furthermore, this information is not a requirement of Reg 147J.

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If additional information is required to assist council to identify the land, it should be something readily ascertainable by the landowner such as the "assessment number" set out in a council rates notice.

- The Form 22 should be made available electronically on the relevant council's website and should contain help-text guidance (colloquially known as "hovers"), for anything that is not self-explanatory or that would be helpful. For example, if the "assessment number" is included in the Form 22, the help-text should assist by stating that this can be found in the rates notice for the land, as issued by the council. Further, if possible, an online interactive registration form should be implemented to enhance the ease and speed of registration.

Question 4: Do you agree with the creation of the proposed new class of building inspector (pool safety) for inspecting and issuing certificates for pool barriers?

Are the proposed prescribed qualifications appropriate for the proposed new class of building inspector (pool safety)?

The LIV considers that it has insufficient expertise to determine qualifications for Pool Inspectors.

However, it is concerned, particularly in view of the issues that have arisen recently in respect of private building surveyors certifying defective buildings, that there must be no potential conflict of interest. The LIV therefore submits that persons who are employed by, or are directors or other officers of, businesses that manufacture, supply or install pool safety barriers should be prohibited from becoming Pool Inspectors.

The LIV is also concerned that, during the initial implementation phase of the Regs, Pool Inspectors may qualify after taking a non-accredited training course (as noted on page 30 of the RIS quoted at Question 3).

The LIV submits that, to avoid consumer detriment and the passing of non-compliant works, only fully trained Pool Inspectors with at least 6 months' practical experience should be permitted to carry out inspections under the Regs. If this is the situation, the LIV submits that the initial timeframe for compliance by 30 October 2020 should be extended and consideration should be given to extending the subsequent deadlines if the safety barrier industry and MBSs report that demand exceeds supply regarding inspections and works to make pools and spas comply with the Regs.

Question 5: How often do you believe pool and spa barriers should be inspected and certified as compliant?

The LIV notes that the RIS recommends the timeframe of every 3 years. Page 139 of the RIS refers to the requirements in Queensland and New South Wales (**NSW**) for Compliance Certificates to be provided in connection with a sale rather than on a regular basis.

The LIV submits that the NSW model, under which owners of land are only obliged to address compliance in connection with a sale or lease of residential premises should be considered, but, if regular inspections are considered necessary, then they should be at 5 or 6 year intervals. Please refer to the LIV's responses to questions 52, 53,55 and 56 outlined in the RIS.

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Question 6: Should pool and spa owners be required to display CPR signage near pools and spas?

The LIV accepts the recommendation not to require such signage at clause 7.2.2 of the RIS.

Question 7: Do you believe that the proposed registration, inspection and certification requirements should also apply to relocatable pools?

The LIV notes from page 136 of the RIS that inflatable relocatable pools are not covered by the Regs.

Therefore, it seems that the relocatable pools that must comply with the Regs are ones that are more substantial and more likely to resemble a swimming pool or spa that cannot be relocated. If there is evidence that such relocatable pools pose a real danger of drowning, it seems logical to try to ensure that they are made safe. However, the LIV queries how an MBS will ensure compliance with the Regs regarding relocatable pools that are by their very nature impermanent.

The LIV is concerned that owners of rental properties may suffer detriment if a tenant, without the landlord's knowledge or consent, erects a relocatable pool that does not comply with the Regs.

Although occupiers are responsible for compliance with Regs 147G and 147H regarding the effective operation of a barrier and keeping gates closed, the owner is responsible for maintenance under Reg 147F. Assuming that these provisions also apply to relocatable pools and spas, the LIV submits that the Regs should permit owners whose failure to comply with the Regs (including Reg 147N requiring an application to register a relocatable pool or spa), is entirely as a result of a tenant's actions, without the landlord's knowledge or consent, to be excused for the contravention and for the liability to fall on the tenant.

To do otherwise and penalise the owner as a result of the tenant's breach of the Regs, would create an injustice in respect of an innocent landlord and cause such landlord substantial financial loss (including a penalty of 10 units under Reg 147N) that cannot be recovered from the tenant under the standard terms of a residential tenancy agreement.

2) Answers to Questions from the Regulatory Impact Statement

Question 52: Do you believe including information regarding certificates of pool and spa barrier compliance in the due diligence checklist under sale of land obligations would promote the safety of swimming pools and spas across Victoria? Please explain your response.

The LIV understands from feedback provided by some estate agents that many purchasers disregard the due diligence checklist.

Therefore, the efficacy of alerting purchasers to potential issues regarding pool and spa safety barriers in that checklist is questionable. Nevertheless, the LIV believes that consumers should be made aware of such information and this should be included in the due diligence checklist.

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The LIV notes that Regulation 15 of the *Estate Agents (Professional Conduct) Regulations 2018* provides as follows:

> **15 Estate agent or agent's representative to ascertain information**
>
> *An estate agent or an agent's representative must make all reasonable enquiries to ascertain the information relevant to a service or transaction relating to the estate agency practice to be provided or performed by the estate agent or agent's representative.*

The LIV submits that Consumer Affairs Victoria (**CAV**) should be advising estate agents about the enquiries that they should make under this regulation if they are appointed to sell a property that contains a swimming pool or spa (including a relocatable pool that would need to be removed from the register if it is not to be included in the sale). The agent should also ensure that the vendor's legal representative is advised of the presence of the pool or spa so that an appropriate special condition can be included in the contract of sale of land.

Despite the above, the LIV is extremely concerned that innocent purchasers could suffer substantial detriment in connection with the purchase of any property that has a non-compliant pool or spa. The annexure to this submission (**Annexure**) contains some scenarios that illustrate this concern.

Question 53: Do you think amending regulation 51(1) of the Building Regulations so potential purchasers can request information regarding the existence of a certificate of pool and spa barrier compliance from the relevant council is sufficient to allow them to fully inform themselves regarding the status of a pool or spa? Please explain your response.

The LIV suggests that such information should either be required to be included in the certificate issued under regulation 51(1) or in a Land Information Certificate in the form prescribed under s229 of the *Local Government Act 1989*. The LIV appreciates that the latter would involve an amendment of the *Local Government (General) Regulations 2015*.

The LIV notes that not all vendors or purchasers apply for a Land Information Certificate or a regulation 51(1) certificate, although it is more common practice to apply for a Land Information Certificate in order to check whether rates are paid or unpaid. Where there is a residence on the land, a vendor is only obliged under s32E of the Sale of Land Act to disclose details of building permits issued in the preceding 7 years in the s32 Statement (despite regulation 51(1) providing for a 10 year period). Sometimes, in order to cut costs, no certificates are obtained, and the vendor provides the prescribed information without it being confirmed by a certificate.

Even if the purchaser obtains such information, where this situation is not fully disclosed in the s32 Statement and no notices or orders have issued by the day of sale, by the time that the purchaser becomes aware of potential problems, the purchaser has entered into the contract of sale and has no right of rescission (unlike the situation in Queensland and NSW).

Question 55: Do you think including a compliance certificate as part of the prescribed information under the Residential Tenancies Act 1997 would promote the safety of swimming pools and spas across Victoria? Please explain your response.

The LIV believes this requirement would promote safety of swimming pools and spas and that the prescribed information is extremely important in order to ensure that a tenant is fully informed

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regarding the safety of a pool or spa barrier at the premises before the tenant enters into a residential tenancy agreement.

Without such documentation the tenant has no means of ascertaining whether the barrier complies with the Regs or not, unless a notice or order has been issued. This is because Regulation 51(1) of the *Building Regulations 2018* has not at present been amended as referred to in question 53 and only enables the tenant to apply for the following information:

> **51 Requests for information from relevant council**
>
> *(1) Any person may request the relevant council to provide in relation to any building or land—*
>
> *(a) details of any permit or certificate of final inspection issued in the preceding 10 years; and*
>
> *(b) details of any current determination made under regulation 64(1) or exemption granted under regulation 231(2); and*
>
> *(c) details of any current notice or order issued by the relevant building surveyor under the Act.*

Despite the fact that "any person" may apply for a regulation 51(1) certificate to identify whether any notices or orders have been issued, the LIV does not believe that such applications are made whenever someone considers entering into a residential tenancy agreement.

The LIV notes that the Regs impose obligations on owners of the land regarding the erection of pool and spa safety barriers and ensuring that they comply with the Regs, with heavy penalties for non-compliance. This should act as an incentive for landlords to ensure compliance. However, until such time as all swimming pool and spa safety barriers in Victoria become compliant, the LIV submits that it would be in the interests of public safety to amend the *Residential Tenancies Act 1997* to provide that an owner must not enter into a residential tenancy agreement unless a pool safety certificate is in place (as is the case in Queensland and NSW).

Question 56: Do you think including a certificate of compliance on the condition report for residential rental properties would promote the safety of swimming pools and spas across Victoria? Please explain your response.

The LIV believes including a certificate of compliance on the condition report would promote the safety of swimming pools and spas for the same reasons as stated at Question 55.

3) Further Comments

The LIV notes that, under Reg 147ZG, if a barrier does not meet the applicable barrier standard but is capable of doing so, the Pool Inspector must give the owner of the land on which the pool or spa is located a notice containing the information set out in Reg 147ZG(3). This includes the date by which the pool or spa must be made compliant, which must not exceed 20 business days after the owner receives the notice. This seems to be an extremely short period of time to enable an owner to obtain at least 3 quotations for anything that is not a minor non-compliance that the owner is capable of addressing personally and to then arrange for the work to be completed.

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A similar procedure applies under Reg 147ZJ where a council can require compliance with a barrier improvement notice within a period specified in that notice of not less than 14 days from the date the owner receives the notice. This is an even shorter timeframe for an owner to complete any works that are not minor in nature.

The LIV queries whether, in the both the above circumstances, the council can extend the time for lodgement of a Compliance Certificate under Reg 147Z. If not, the LIV submits that Reg 147Z should apply and failure to give an extension should be capable of being appealed to the BCA as set out in Question 3.

4) Conclusion

The LIV is concerned that, owing to the widespread incidence of non-compliant pool and safety barriers referred to on page 6 of the RIS, the pool and spa barrier industry will not have the capacity to complete work bringing all existing pools into compliance by the designated dates, mainly the first date of 30 October 2020. The LIV queries if this problem will be compounded by a lack of properly qualified Pool Inspectors and submits that this issue should not be resolved by way of allowing under qualified Pool Inspectors to carry out inspections and issue notices under the Regs, potentially causing consumer detriment.

The LIV is also concerned that, until such time as all Victorian pools and spas are made compliant with the Regs, despite any public information campaigns, purchasers may suffer loss and damage owing to scenarios such as those posited in the Annexure.

The LIV submits that the relevant information should be included in the certificate issued under regulation 51(1)of the Building Regulations.

The LIV submits that the compliance requirements of the Regs should not come into effect until such time as the changes listed in the preceding paragraph have been implemented

The LIV agrees to this submission being made public by the Department of Environment, Land, Water and Planning.

Members of the LIV's Property and Environmental Law Section would be pleased to meet with members of your Department and representatives of CAV to answer any queries you may have regarding the conveyancing procedures referred to in this submission and any potential changes to the Regs or other legislation in relation to those procedures.

Please contact me or Senior Lawyer, Paul Snow at psnow@liv.asn.au or 9607 9314 if you wish to discuss any aspect of this letter further.

Yours sincerely,

Stuart Webb
President
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ANNEXURE

Potential scenarios causing consumer detriment in respect of the implementation of the proposed *Building Amendment (Swimming Pool and Spa) Regulations 2019* (Regs)

SALE SCENARIOS

Scenario 1

A vendor proposes to sell a property which includes his residence and an in-ground concrete swimming pool (**Pool**). The vendor does not wish to comply with the Regs as he suspects that the Pool has a non-compliant safety barrier.

The vendor instructs a conveyancer to prepare a statement under s32 of the *Sale of Land Act 1962* (**s32 Statement**) and asks his estate agent to use the standard form of contract approved by the LIV and the REIV for the sale of land in Victoria (**Contract**)if the agent finds a suitable purchaser. The Contract does not contain any special conditions in relation to either the Pool or compliance with the Regs.

The s32 Statement is only required to contain information regarding building permits issued in the last seven years and any notices or orders that come under the following provisions in s32D:

> "(a) particulars of any notice, order, declaration, report or recommendation of a public authority or government department or approved proposal directly and currently affecting the land, being a notice, order, declaration, report, recommendation or approved proposal of which the vendor might reasonably be expected to have knowledge;"

The building permit that authorised construction of the Pool was issued more than seven years previously and the local council has not issued any notices or orders in respect of the land. The day of sale in the contract is 1 April 2020 and the settlement date is 1 June 2020.

The vendor does not apply to register the Pool on 14 April 2020. The purchaser does not understand the provisions of the Regs and fails to obtain any legal advice in respect of them.

Settlement takes place and the council realises, upon receipt of the notice of acquisition, that the vendor has not applied to register the Pool. The council serves a notice under Reg 147O requiring the purchaser, as the new owner, to apply for registration of the Pool and imposes a penalty of 10 penalty units.

The purchaser thought that the Pool did comply with the Regs. The price of the land was negotiated on that basis. The purchaser has to arrange for the Pool to be inspected and for the works needed to bring the Pool into compliance to be done. The purchaser cannot recover any of these expenses from the vendor because the vendor has never given the purchaser any information regarding the Pool and there is no likelihood that the purchaser would succeed in bringing any legal action for misrepresentation or misleading and deceptive conduct against the vendor. Because of the delays caused by the vendor's inaction, the purchaser is forced to seek an extension of the time limits for provision of the first certificate of pool or spa compliance (**Compliance Certificate**).

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Even if the purchaser had become aware of the obligation to apply to register the Pool by 14 April 2020, the purchaser could not force the vendor to do so and could not make the application itself because the relevant Regs (147L, 147M or 147N) only refer to such applications being made by the owner of the land.

Scenario 2

Same as for Scenario 1 except that the vendor applies to register the Pool by 14 April 2020 but does not give the purchaser the notice issued by the council under Reg 147R and the vendor takes no steps to arrange an inspection of the Pool and to make it compliant with the Regs.

Under general condition 21 of the Contract, the purchaser is responsible for any notice or order that is issued or made on or after the day of sale that does not relate to periodic outgoings. Therefore, the purchaser, not the vendor, is legally obliged to comply with a notice of which it is unaware. Alternatively, if the vendor did provide the notice to the purchaser before settlement, the purchaser would have the right under the same general condition to enter the property to comply with that responsibility "where action is required before settlement". It could be argued that any action to be taken under the notice e.g. inspection of the Pool, is not **required** before settlement because the first Compliance Certificate does not have to be lodged with the council until after settlement.

The purchaser cannot rescind the contract prior to settlement because the s32 Statement is neither incomplete nor defective and there is no basis for any legal actions against the vendor such as the ones listed in Scenario 1.

Conclusion

There are other possible scenarios which have not been explored in this Annexure. However, it can be seen from the above scenarios that an ignorant purchaser has suffered substantial detriment and financial loss as a result of having no ability to ascertain more information about the Pool in either a certificate under regulation 51(1) or a s32 Statement, coupled with no specific right to rescind the Contract because the vendor does not have a Compliance Certificate.