

Coroners Act 1996

[Section 26(1)]



Western

Australia

RECORD OF INVESTIGATION OF DEATH

Ref No: 38/13

I, **Barry Paul King**, Coroner, having investigated the death of **James Gregory Box** with an inquest held at the **Kalgoorlie Coroner's Court, Court 2, Kalgoorlie Courthouse, Brookman Street, Kalgoorlie**, on **16 to 18 September 2013**, find the identity of the deceased person was **James Gregory Box** and that death occurred on **11 March 2012** at **Kalgoorlie Hospital** from **immersion (drowning)** in the following circumstances:

Counsel Appearing:

Sergeant Lyle Housiaux assisting the Coroner
J C Van Der Walt (Jackson McDonald) on behalf of Mr Gilmore and First National Real Estate

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INTRODUCTION

1. James Gregory Box (**the deceased**) was a healthy three year old boy living with his mother, Natasha Lee Newman, and her partner, Jason Matthew Dunstan, in a rental house at 177 Hare Street, Piccadilly, a suburb of Kalgoorlie (**the house**). Also living on the premises in a granny flat was a friend of Mr Dunstan, Christopher Laurie Tirant.
2. The house was owned by Ross Allen Baker and Elizabeth Jay Baker. It was managed as a rental property by First National Real Estate Kalgoorlie (**First National**).
3. The house had a swimming pool. Access to the pool from the house was available from the dining room by way of a sliding glass door and a self-closing sliding security door. The security door was fitted in accordance with a requirement under the *Local Government (Miscellaneous Provisions) Act 1960* to provide a barrier to the pool area to ensure that unsupervised children did not gain access to the swimming pool.
4. The security door did not function properly in that it jammed instead of sliding, so that it would not self-close and was difficult to open. Despite requests from the tenants, neither First National nor Mr Baker repaired or arranged for the repair of the security door.
5. Out of frustration with the inconvenience associated with the fact that the security door did not function properly, Mr Dunstan regularly removed it from its position outside the sliding glass door and placed it against an outside wall of the house.
6. On 11 March 2012, the deceased went from the house into the pool area. Some minutes later, Mr Dunstan found the deceased floating in the swimming pool, unresponsive. Resuscitation was attempted but to no avail.
7. On 16, 17 and 18 September 2013 an inquest into the death was held at the Kalgoorlie Courthouse. One issue

at the inquest was the failure by relevant persons to have ensured that the security door was in place and working properly. Appropriate means of increasing the likelihood that another death does not occur in similar circumstances were also canvassed.

8. The documentary evidence at the inquest included the results of an investigation by Constable Bradley James Ward of the Western Australian Police Force¹ and a series of publications by the Royal Life Saving Society (**RLSS**) relating to pool barriers and deaths by drowning.² A letter from the Real Estate Institute of Western Australia (**REIWA**) in response to correspondence from Counsel Assisting was also taken into evidence.³
9. Oral testimony was heard from Constable Ward, Mr Dunstan, Mr Tirant and Ms Newman. Mr Dunstan's previous partner, Nicole Jane Wynn Papas, gave evidence about her experiences at the house from October 2011 to December 2011 when she and her two children lived there.
10. First National employees Amy Katrina Wilson, Elysia Kate Davy and Kristy Anne Kolatowicz described their roles in the management of the rental of the house, and the principal of First National, John Gavin Gilmore, testified about the organisation of his employees. Documentation from First National was attached to a statement by Mr Gilmore.⁴
11. The deceased's father, Michael James Box, told the court about his concerns about the pool fencing at the house and about the deceased's ability to open doors.
12. Mr Baker provided oral evidence about his communications with First National and about his plans to repair the door in March 2012.

¹ Exhibit 1 Volumes 1 and 2

² Exhibits 3-6

³ Exhibit 2

⁴ Exhibit 1 Volume 3

13. The manager of health and compliance at the City of Kalgoorlie-Boulder, Alexander Ronald Weise, and a previous pool inspector with the City, Derrick Ainslie Simpson, provided evidence related to the state of the pool barrier at the material time. Mr Weise also provided useful evidence about perceived shortcomings with the regulatory environment governing home swimming pools and spas.
14. Following the inquest, the Court received a report from the Building Commission, a division of the Western Australian Department of Commerce. The report was entitled 'Private Swimming and Spa Pool Safety Barriers – Report for the Coroner into the drowning death of James Box'. The report provides a thorough description of the legislative requirements applicable to pool barriers; in particular, the legislation applicable to the pool barrier at the house.
15. Also available to the Court was a Discussion Paper for Public Consultation produced by the Building Commission. Its full title was Swimming and Spa Pool Safety Barriers – Proposal for Western Australia to adopt AS 1926.1-2012 through the Building Code of Australia.

THE DECEASED

16. The deceased was born without complications at the Kalgoorlie Regional Hospital on 9 March 2009. His mother, Ms Newman, and his father, Mr Box, were then living in a house in Piccadilly.
17. Within a couple of months of the deceased's birth, Ms Newman and Mr Box separated. The deceased lived with Ms Newman but would stay with Mr Box on weekends. That arrangement remained in place after Ms Newman and Mr Box each started relationships with new partners.
18. After about seven months, Ms Newman separated from her new partner. The deceased went to live with Mr Box until Ms Newman decided to move to Bunbury to stay

with her mother. The deceased then went to live with Ms Newman in Bunbury for three weeks a month and would spend one week a month with Mr Box in Kalgoorlie. It appears that this arrangement began near the end of November 2011.

19. During this time, Ms Newman noticed that the deceased seemed to be increasing his independence beyond what would be expected for a child of his age. According to Mr Box, the deceased was able to open doors from the time he was 16 months of age.⁵
20. On or about 26 December 2011 the deceased went to stay with Mr Box and his fiancée in Kalgoorlie for two weeks. Shortly after that, Ms Newman started a relationship with Mr Dunstan and moved into the house at 177 Hare Street Piccadilly. She developed a severe chest infection, so arranged for the deceased to stay longer with Mr Box and his fiancée so as not to expose the deceased to the illness.
21. In late January 2012 Ms Newman took the deceased back from Mr Box against Mr Box's wishes. The deceased then resided at the house. In the first week of March or so, he became sick with chicken pox but that cleared and the usual symptoms abated.

177 HARE STREET PICCADILLY

22. The house was originally built in 1973 and then renovated between 1983 and 1999 to add a games room, a garage, a patio sun room and an outdoor swimming pool.
23. The addition of the swimming pool was approved by the City of Kalgoorlie-Boulder in February 1999⁶ and the pool was first inspected by pool inspectors on 2 August 1999.⁷

⁵ ts 201, 204

⁶ Exhibit 1 Volume 2 Tab 6

⁷ Exhibit 1 Volume 1 Tab 29

24. The pool was inspected again in January 2003, March 2005 and June 2009 in accordance with the relevant regulations.
25. The pool area was surrounded on three sides by corrugated metal fencing, with a gate on one short side leading to a back yard area. On the fourth side of the pool area, the side wall of the house with the sliding glass door and the sliding security door acted as a barrier.
26. The pool inspection report of 2 August 1999 contained remarks that the sliding door latch needed to be a minimum of 1500mm from inside floor level. It is unclear whether the remarks related to the glass sliding door, as I suspect, or the security door.⁸
27. The pool inspection reports for January 2003 and March 2005 indicated that the pool area was in full compliance with ‘the provisions of the relevant Australian Standards or (sic) the Building Code of Australia’.⁹
28. Mr and Mrs Baker bought the property in May 2005¹⁰ and began to live there.
29. The pool inspection report of June 2009 contained remarks that the door to the pool area must be self-closing and latching from all positions, which indicate that the door was not functioning properly.¹¹ I infer from the facts that the sliding glass door was not inherently self-closing but that the security door was, that the remarks pertained to the latter.
30. A second, follow-up inspection in 2009 found that the pool’s fences and gates complied with the relevant Australian Standards and the Building Code of Australia, indicating that the security door had been fixed.¹²

⁸ Exhibit 1 Volume 1 Tab 29

⁹ Exhibit 1 Volume 1 Tab 30

¹⁰ Exhibit 1 Volume 1 Tab 10

¹¹ Exhibit 1 Volume 1 Tab 32

¹² Exhibit 1 Volume 1 Tab 33

31. Mr Baker did not recall that the security door had failed an inspection and needed repair.¹³
32. The Bakers lived in the house until early 2010 when they moved out and took steps to rent it. They entered a management agreement with First National in June 2010.
33. First National first obtained tenants for the Bakers in, it appears, August 2010.¹⁴ According to Mr Baker, those tenants were a couple with two older children.¹⁵
34. For reasons that are not apparent, the pool at the house was inspected again on 22 November 2010 by an inspector from the City of Kalgoorlie-Boulder and found to be compliant with regulations.¹⁶
35. About the time that the first tenants moved out of the house in 2011, Mr Baker carried out maintenance and repair on the property. As a result of a discussion with the tenants, he repaired the security door by replacing the rollers on the bottom. He was satisfied that the door was working properly as a result.

LEGISLATIVE REQUIREMENTS

36. In March 2012 private swimming pools in Kalgoorlie were regulated through the *Local Government (Miscellaneous Provisions) Act 1960 (LGMP Act)* and the *Building Regulations 1989 (BR 1989)* made under the LGMP Act.
37. The LGMP Act provided that local laws could be made to require the owner or occupier of land on which there was a swimming pool to install prescribed structures or devices for the protection of persons who may be on the

¹³ ts 230

¹⁴ Exhibit 1 Volume 3 Tab 1 p.46

¹⁵ Ms Wilson also remembered two older children: ts 113

¹⁶ Exhibit 1 Volume 2 Tab 34

land.¹⁷ It also required a local government to inspect the land and swimming pool every four years.¹⁸

38. Part 10 of the BR 1989 defined a swimming pool to be a swimming pool in which there was water that was more than 300mm deep.¹⁹ The owner or occupier of premises on which there was a swimming pool was obliged to install or provide an enclosure around the pool that was suitable to restrict access by children under the age of 5 years to the pool.²⁰ The enclosure had to consist of a fence, wall, gate or other barrier and comply with Australian Standard AS 1926.1 or be approved by the local government.²¹ Any wall in the barrier could contain no means of access through a building other than a window that accorded with Australian Standard AS 1926.1 or a door approved by the local government.
39. Importantly, swimming pools installed before 5 November 2001, which of course included the swimming pool at the house, could have a barrier which included a wall that contained a door if the door satisfied the requirements of Australian Standard AS 1926.1. Those requirements allowed the use of a child resistant door such as the sliding security door at the house to provide direct access to the pool from the house.
40. On 2 April 2012, the *Building Act 2011* (**Building Act**) and the *Building Regulations 2012* (**BR 2012**) came into operation. The provisions of those written laws remain in operation at the time of this finding.
41. In its definitions provision,²² the BR 2012 defines private swimming pool to mean a place, including a spa-pool, to which the public are not entitled to use and which has the capacity to contain water that is more than 300mm deep. (underlining added)

¹⁷ s245A(2)

¹⁸ s245(5)

¹⁹ Reg 38A

²⁰ Reg 38B(1)

²¹ Reg 38B(3)

²² Reg 3

42. In the Part of the BR 2012 regulating private swimming pools,²³ an obligation is placed on each owner and occupier of premises on which there is a private swimming pool containing water that is more than 300mm deep to ensure that there is installed or provided around the pool an enclosure that restricts access by young children to the pool and its immediate surrounds (I shall refer later to the underlined words in this and the previous paragraph).
43. BR 2012 maintains the regulation of swimming pool enclosures provided in BR 1989, including allowing swimming pools installed before 5 November 2001 to have as part of a barrier a wall containing a child resistant door.
44. The Building Commission in Western Australia has published a discussion paper in relation to a proposal to adopt Australian Standard AS 1926.1-2012 in relation to swimming pool barriers. As I understand the proposal, it would result, if accepted, in the approval of child resistant doors on newly constructed premises to provide direct access from a house to an outdoor pool area being unavailable, but would allow the owners or occupiers of premises with pools built before 5 November 2001 to maintain their current arrangements. That is, child resistant doors such as the sliding security door at the house at 177 Hare Street Piccadilly would be allowed to remain.
45. By way of contrast, in Queensland legislation was introduced in two stages to provide a much more stringent regulation of private swimming pools.
46. The first stage commenced on 1 December 2009 and related to new swimming pools.
47. The second stage commenced one year later. It replaced 11 different pool safety standards with one standard, and now requires both new and existing pools to be upgraded to comply with the standard within five years unless the property is sold or leased first. The new

²³ Part 8 Division 2

standard prohibits a door from being part of a barrier, even if it is child resistant. There is no exception for existing pools irrespective of when they were constructed.

48. The second stage also introduced a requirement for pool safety certificates to be obtained by persons selling or leasing properties with pools. A pool safety certificate could not be issued unless the relevant pool complied with the new standard.²⁴

NEW TENANTS

49. In early October 2011 Mr Dunstan, Ms Wynn Papas and Mr Tirant applied to First National to rent the property at 177 Hare Street, Piccadilly. The application form they submitted indicated on the front page that there would be five occupants of whom two would be children aged two and three years of age.²⁵
50. On 13 October 2011, they entered into a residential tenancy agreement with the Bakers through the real estate agent First National. The front page of the tenancy agreement indicated that five persons would be living at the premises: three adults and two children.²⁶
51. Mr Baker, who apparently was responsible for communications with First National on behalf of his wife and himself, stated in evidence that he had not seen the application form.²⁷ He said that he had seen the tenancy agreement but had not noticed the reference to children.²⁸ He said that he may have been told something by First National but missed it.²⁹

²⁴ This information can be found in the finding of Coroner John Lock in the Inquest into the Death of a 2 year old child, Coroner's Court, Brisbane, delivered 13 December 2010, File no 208/124, paragraphs 91-95; see also *Building Act 1975* (Qld) Chapter 8; *Building Regulation 2006* (Qld) Part 4; Queensland Department of Housing and Works website - *Queensland Development Code* Mandatory Part 3.4

²⁵ Exhibit 1 Volume 2 Tab 16

²⁶ Exhibit 1 Volume 2 Tab 17

²⁷ ts 211

²⁸ ts 210-211, 234

²⁹ ts 212

52. In his statement to police, Mr Baker stated that he approved all tenants who leased his property and that he would not approve young children because of the pool. He said that he had informed First National verbally that he did not want tenants with young children.³⁰ In oral evidence he reiterated that he had told First National that he and his wife did not want anyone with young kids and that they thought that the three adults were the only people who would be living there.³¹
53. Ms Wynne Papas provided a statement in which she described how in August 2011 she and her partner of four and a half years, Mr Dunstan, moved to Kalgoorlie with their children to find work.³² They applied for a property and on 13 October 2011 entered a residential tenancy agreement for 177 Hare Street Piccadilly, moving in on the same day. They had been provided with forms to be completed and submitted if they wanted to complain about repair or maintenance issues.
54. Ms Wynne Papas related how a property condition report was provided to them by First National. She and the other new tenants were required to review the report and to return it with proposed changes to First National within seven days.
55. She made two notes on the report that are relevant.
56. Of primary importance, on the top of a page of the report in a section entitled 'External Back', Ms Wynne Papas wrote 'security sliding door to pool keeps coming off its rail.' She also noted under the heading 'Bathroom' that the skylight leaks when it rains.
57. Ms Wynne Papas told the Court how the security door would jam both when being opened and when being closed and how she would keep putting it back on its rail when it came off. She said that when it was put back on the rail it could be closed again and could be locked.

³⁰ Exhibit 1 Volume 1 Tab 15

³¹ ts 210-211

³² Exhibit 1 Volume 1 Tab 10

She would lock it to ensure that her children did not get out into the pool area.³³

58. Ms Wynne Papas believed that by her identifying the problem with the security door on the property condition report, First National would take steps to have the door repaired.³⁴ She did not fill out a form requesting that the door be fixed.³⁵
59. Ms Wynne Papas and Mr Dunstan used the door to the pool area in order to go outside to smoke cigarettes. It was convenient for them to use that area to smoke and it gave Ms Wynn Papas the advantage of being able to keep an eye on the children from there. An alternative outdoor area was the back yard, which was accessible by way of another sliding glass door in the games room off the dining room, but it was not as convenient.³⁶
60. Due to the problems with the security door jamming, Mr Dunstan became increasingly annoyed with First National. He tried to fix the door himself at one stage, but realised that he did not have the correct tools, so did not carry out the necessary repairs. He told the Court that he was not mechanically minded in any event.³⁷
61. Alarming, Mr Dunstan's frustration with the security door regularly jamming led to him taking the door off its rails, disconnecting it from the self-closing mechanism and leaning it against the wall of the back of the house. He did this despite being concerned that children would gain access to the pool and could drown if the security door was not in place.³⁸
62. When Mr Dunstan removed the security door, Ms Wynne Papas would put the door back on its rail. She did so, she said, because she had children. She agreed that she was worried that they would get into the pool area and be at risk of falling into the water.³⁹

³³ ts 37

³⁴ ts 39

³⁵ ts 40

³⁶ ts 41

³⁷ ts 52

³⁸ ts 53

³⁹ ts 40

63. Mr Dunstan was unaware that he could have contacted the pool inspectors at the City of Kalgoorlie-Boulder about the security door.⁴⁰
64. The relationship between Ms Wynne Papas and Mr Dunstan deteriorated while they were living at the house. They would argue and Mr Dunstan became physically abusive. Ms Wynne Papas became scared of him and took steps to be removed from the lease and to move back to Perth with the children. She moved out on 11 December 2011.
65. On 21 November 2011, Ms Wynne Papas was present at the house when Ms Wilson of National First conducted a 'Lessor Routine Inspection'. It appears that Ms Wynne Papas told Ms Wilson about a leaking skylight but not about the jamming security door.
66. A week later, on 28 November 2011 the tenants received a letter from First National stating that the amendments made by Ms Wynne Papas to the initial property condition report were accepted.
67. Ms Wynne Papas later learned through a telephone conversation with Mr Dunstan that the leaking skylight had been repaired within a few days of her moving out.

FIRST NATIONAL'S INVOLVEMENT UNTIL 31 DECEMBER 2011

68. First National's property management department consisted of four property managers, each with an assistant, as well as a senior accounts clerk and a senior property manager. Mr Gilmore, as principal of the agency, oversaw and managed the department. The property managers were each somewhat autonomous in managing their portfolios of properties, but they would go to Mr Gilmore with any problems.⁴¹

⁴⁰ ts 53

⁴¹ ts 173, 179

69. The property managers at First National were trained by the senior property manager, and they undertook a REIWA property management course, either in Perth or externally.
70. A major role of property managers at First National was to inspect rental properties on behalf of their clients. However, no part of their training related to the identification or rectification of potential hazards apart from, it seems, checking to ensure that the respective property had two residual current devices (**RCD's**) installed and hard-wired smoke alarms.
71. The property manager at First National who had the property at 177 Hare Street in her portfolio was Ms Wilson. As part of her training she had attended the REIWA course in Perth but did not receive training on RCD's apart from knowing what to look for so that the number of RCD's could be recorded on an inspection checklist.⁴² She received no training in relation to pool barriers. Ms Wilson managed 250 to 300 properties as part of her portfolio.
72. Ms Wilson told the Court that, when carrying out an initial inspection of a property that had a swimming pool, she would check the condition of the pool, but would not test the pool barrier apart from making sure that the fencing was standing and not damaged. While she would go through the gates in a swimming pool barrier and would notice if they did not close, she would not test them any further. As to self-closing security doors, she would open them and check to see that they closed so that they could be recorded as working.⁴³
73. When a tenant vacated a property, First National staff would inspect the premises to list the condition in which it was left in order to produce a current property condition report. A copy of the property condition report would then be provided to the incoming tenants who

⁴² ts 105

⁴³ ts 107-108

were asked to include in it any issues missed during the inspection and to return it to First National.⁴⁴

74. On 7 October 2011, Ms Wilson and Ms Kolatowicz carried out an inspection of 177 Hare Street. They filled out a final property condition report which they finalised on 31 October 2011. Ms Wilson completed the section of the report relating to the pool area but made no mention of the condition of the sliding security door.⁴⁵
75. Ms Wilson leased the property to Mr Dunstan, Ms Wynn Papas and Mr Tirant on behalf of the Bakers by signing a lease agreement in a form from the *Residential Tenancies Act 1987*. She went through the lease agreement with them and provided them with a copy of the property condition report as stated by Ms Wynn Papas.
76. Ms Wilson understood that a term of the lease agreement requiring the tenant 'to keep the pool in a well maintained safe condition and observe all legal requirements' meant that the tenant would have to ensure that the pool was fenced securely.⁴⁶
77. Also included in the lease was a term requiring the written consent of the lessor before the tenant undertook or carried out any repairs. The term expressly excluded the operation of s43 of the *Residential Tenancies Act 1987*.⁴⁷ That section relevantly provided

43. Compensation where tenant sees to repairs

- (1) It is a term of every agreement that the owner shall compensate the tenant for any reasonable expense incurred by the tenant in making urgent repairs to premises where —
 - (a) the state of disrepair has arisen otherwise than as a result of a breach of the agreement by the tenant and is likely to cause injury to person or property or undue inconvenience to the tenant; and

⁴⁴ ts 114

⁴⁵ Exhibit 1 Volume 3 Tab 1 p 64-67

⁴⁶ ts 117

⁴⁷ Exhibit 1 Volume 2 Tab 17 p 4

- (b) the tenant has made a reasonable attempt to give to the owner notice of the state of disrepair and of his intention to incur expense in repairing the premises.

- 78. At the material time, s82(3) of the *Residential Tenancies Act 1987* provided for the exclusion of s43 by written agreement between the parties. Section 43 was replaced and s82(3) was repealed by the *Residential Tenancies Amendment Act 2011* with the relevant sections of that Act coming into operation on 1 July 2013.
- 79. Seemingly contrary to Mr Baker's evidence, Ms Wilson said that the Bakers approved the two children over the phone to her.⁴⁸
- 80. First National received the property condition report back from the tenants. Ms Wynn Papas had annotated it in blue pen. It is not entirely clear when the report was delivered to First National, but there is no doubt that it was before 25 November 2011 because First National's electronic copy of the report was updated on that date and on 28 November 2011 a letter was sent from First National to the tenants indicating that it agreed with the amendments made by Ms Wynn Papas.
- 81. As noted previously, Ms Wynn Papas had written on the report that the sliding security door keeps coming off its rail.
- 82. The procedure in place at First National for the return of annotated property condition reports was for them to be date-stamped upon return and to be forwarded to the relevant property manager for sign off and handing over to the assistant. In this case, the relevant property manager was Ms Wilson.
- 83. Ms Wilson told the Court that she was aware of the importance of the sliding security door and that, had she seen Ms Wynn Papas' note, it would have set off alarm bells and she would have taken steps to have the door

⁴⁸ ts 116. A phone conversation was also recalled by Mr Baker: ts 212

repaired, but due to an administrative oversight she did not see the returned report.

84. Ms Wilson's assistant, Ms Kolatowicz arranged for the report to be updated and scanned, and she arranged for the letter of 28 November 2011 to be sent off to the tenants, but she did not recall having seen the report and had no reason to have looked at its contents. In the circumstances, I infer that it is unlikely that she had looked at it.
85. As noted above, on 21 November 2011, Ms Wilson went to the property to complete a Lessor's Routine Inspection Report. Ms Wynn Papas and Mr Dunstan were present, but neither mentioned the malfunctioning sliding security door.⁴⁹ Ms Wilson did not record anything on the report about the sliding security door, but she also failed to note other relevant damage.⁵⁰
86. Some days later, Ms Wynn Papas contacted Ms Wilson asking her what she needed to do to be taken off the lease. Ms Wilson informed Ms Wynn Papas that a letter signed by the other tenants would be required. Ms Wynn Papas obtained such a letter and on 29 November 2011 Mr Baker approved the amendment to the lease to remove Ms Wynn Papas. As noted, she moved out on 11 December 2011 with her children.

JANUARY 2012

87. During 2011 Ms Newman had met Mr Dunstan through mutual friends at a pub in Kalgoorlie while she was living there. In December 2011 she went from Bunbury to Kalgoorlie to visit friends, and on about 30 December 2011 she moved into the house to commence a relationship with Mr Dunstan.
88. At that stage, the deceased was still with his father, Mr Box, and his fiancée in Kalgoorlie. The intention of

⁴⁹ Exhibit 1, Tab 12, paragraph 49

⁵⁰ ts 127; Exhibit 3, Tab 1 p.68

Ms Newman and Mr Box was that the deceased would remain with Mr Box for two weeks from 26 December 2011.

89. However, during January 2012 Ms Newman was ill with a serious respiratory infection. She remained at the house and was bedridden for over a week while Mr Dunstan looked after her. Ms Newman was concerned about the deceased contracting the infection because he was prone to pick up illnesses quickly and he had been treated since early 2011 for asthma, so she and Mr Box agreed that the deceased should remain with Mr Box and his fiancée until Ms Newman's condition improved enough for her to take the deceased back. In the meantime, the deceased visited with Ms Newman on Sundays.
90. By around the end of January 2012 Ms Newman had recovered sufficiently to look after the deceased full-time. Mr Box refused to return the deceased to Ms Newman's care, citing as one of the reasons his concerns that the pool at the house was not fenced properly.
91. Ms Newman nonetheless took the deceased back into her care at the house from, it appears, the first week of February 2012 at the latest.

FEBRUARY 2012

92. When the deceased was living at the house, he was not allowed to go into the pool area by himself, but Mr Tirant recalled seeing him alone in the pool area having let himself out while the sliding security door was jammed open.⁵¹ It appeared that he had opened the sliding glass door enough so that he could squeeze through.
93. Both Mr Dunstan and Ms Newman told the Court that the sliding glass door from the dining area to the pool area was difficult to close and lock, but was very easy to unlock. All that was required was a swiping motion with

⁵¹ ts 70

a finger with minimal pressure.⁵² It was something that the deceased could have done, though Ms Newman had never seen him do it.

94. Mr Tirant stated that he had seen the deceased unlock the sliding glass door himself and that he had seen him slide the door open from a closed position when the adults of the house were sitting outside.⁵³
95. In early February 2012 Mr Dunstan wrote a letter consisting of a list of items that needed to be repaired on the property at 177 Hare Street Piccadilly. The first item on the list was 'Pool flyscreen roller's broken and auto return'.
96. Ms Newman re-wrote the letter in a more legible form and Mr Dunstan and Mr Tirant signed it. Mr Dunstan took it to the First National office where, as with the returned property condition report, it was not date-stamped.
97. The letter was forwarded to Ms Wilson. Ms Wilson said that the first item on the list triggered a worry for her because of the potential safety issue of children having access to the pool. She forwarded the letter to Ms Kolatowicz as the maintenance officer with the expectation that Ms Kolatowicz would contact Mr Baker fairly quickly. Ms Wilson assumed that Ms Kolatowicz understood what was meant by the item and would know what to do with it.⁵⁴
98. Ms Wilson was not aware that Ms Newman and the deceased were living at the house.⁵⁵
99. On 13 February 2012 Ms Kolatowicz sent a copy of the list of items to Mr Baker by email. The next day, Mr Baker called Ms Kolatowicz to discuss the list. Ms Kolatowicz did not understand what the first item

⁵² ts 56 and 75

⁵³ ts 69

⁵⁴ ts 134-136

⁵⁵ ts 130

meant, but Mr Baker said that he did. He told Ms Kolatowicz to leave it with him.⁵⁶

100. Ms Kolatowicz made handwritten notes on a copy of the list indicating what items Mr Baker told her he would organise.
101. On 23 February 2012 she copied the list with the notes and sent a copy to Mr Dunstan by email with a request for further information about other items. Mr Dunstan responded later that day with the information requested.
102. In the meantime, on 21 February 2012 a newly promoted property manager at First National, Elysia Davey, attended the property in order to complete a lessor routine inspection report. She met with Ms Newman and saw the deceased at the house.
103. In a statement provided to police in May 2012, Ms Davey stated that Ms Newman did not mention anything about the sliding security door. She confirmed that recollection in oral testimony taken by telephone.⁵⁷
104. Ms Newman had a very different memory of Ms Davey's attendance at the property. She was sure that she had told Ms Davey about the security door. She made a statement to police to that effect in June 2012 and in oral testimony she said that Ms Davey's statement that she had not mentioned anything regarding the security door was incorrect. She said -

As a mother, you want to be able to protect your children, and I knew that that door wasn't safe for my son. And I shouldn't have moved into the house knowing that, but I knew that that door wasn't safe and you want your kids protected.

105. It is not possible for me to find which of this directly conflicting evidence is correct. Due to the fact that Mr Dunstan had already provided the letter with the list of items to First National, the question of whether Ms Newman raised the issuer of the security door with

⁵⁶ ts 220

⁵⁷ ts 150

Ms Davey does not have the significance it might otherwise have.

106. Ms Davey did not notice the security door and was not aware that it was required to be self-closing. She said that she had never seen a property with a swimming pool where an internal door led straight out to the pool area. Even if she had seen the security door lying on the ground, she would not have appreciated the danger associated with it not being in its place with the sliding glass door.⁵⁸

MARCH 2012

107. Ms Kolatowicz called Mr Baker on, it appears, 2 March 2012 to discuss the list of items sent by Mr Dunstan.⁵⁹ It is apparent that, by this time, Mr Baker had not arranged for the repair of the sliding security door. He and Ms Kolatowicz had a lengthy discussion about the items in the list.
108. Initially Mr Baker decided that he would allow First National to organise the repair of the security door, but he later changed his mind and told Ms Kolatowicz that he had decided that he would drive to Kalgoorlie and deal with all the items on the list with the help of a local handyman, except for an item identifying torn curtains in the dining room.
109. Mr Baker authorised Ms Kolatowicz to arrange for the replacement of the curtains in the dining room because they were outside the scope of a handyman.⁶⁰
110. Ms Kolatowicz's evidence was that Mr Baker had indicated to her that he would go to Kalgoorlie at the end of March 2012, but Mr Baker was adamant that he had arranged to go there 'at the end of the following week'. If their conversation took place on 2 March 2012 and

⁵⁸ ts 154

⁵⁹ Exhibit 1 Volume 2 Tab 25 indicates the week after 23 February 2012 and Mr Baker recalled it being a Friday: ts 221

⁶⁰ ts 227

Mr Baker's evidence is correct, he had planned to be in Kalgoorlie on 9 March 2012. But he later told the Court that he planned to go there on the weekend after the death; being Friday 16 March 2012.⁶¹

111. Mr Baker accepted that he had an obligation to maintain the security door in a serviceable condition and that the purpose of the door was to ensure that children did not go into the pool area unsupervised. He said that he did not know that children had been living at the house because he had not properly read the lease previously and that, at the relevant time, he thought that there were only two gentlemen living there. He did not think that repairing the sliding security door was urgent.⁶²
112. When it was put to Mr Baker that the requirement to have a barrier was not dependent on children living in the premises, he said that he thought that the fact that there were two doors, namely the sliding glass door and the sliding security door, would mean that one door would cover another.⁶³
113. Mr Baker said that the cost of having a tradesman fix the security door would have been about \$200. He said that if First National had said to him that they thought he should fix the security door, he would have said, 'Fix it.'

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114. At about 8.00am on Sunday 11 March 2012 Ms Newman woke the deceased, changed his nappy and dressed him. The two of them had breakfast and watched television in the lounge room, situated separately from the dining room and out of sight of the sliding glass door to the pool area.

⁶¹ ts 235-236

⁶² ts 224

⁶³ ts 222, 229-230

115. Mr Dunstan, who had worked until early that morning, awoke about 10.00am and joined them in the lounge room. The deceased then played about the house while the adults stayed in the lounge room. It was characteristic of the deceased to play about the house and to go to the back yard area through the games room door to play with the dogs while Ms Newman carried out her domestic routine.
116. Ms Newman recalled that the sliding glass door to the swimming pool area was closed and locked from the night before. As far as she was aware, the door was still locked during the morning.⁶⁴
117. Ms Newman's evidence about the state of the security door that morning was that she had shut it before she went to bed the night before, but that she presumed that Mr Dunstan had taken it off or that it had fallen off when he went out for a cigarette when he came home from work after she had gone to bed. Echoing Ms Wynn Papas' evidence, Ms Newman said that Mr Dunstan would get angry and frustrated with the security door jamming and would take it down, and she would place it back up. She said that this would occur three or four times a day.
118. When it was getting close to lunch time on 11 March 2011, Ms Newman came out of the laundry and saw the deceased in the kitchen. The deceased was hungry and wanted a biscuit. She told him that he could only have two biscuits since it was almost time for lunch. It seems that Ms Newman went back to her chores and the deceased went back to the lounge room where he stayed for a few moments before going off on his own.
119. At about noon Mr Dunstan left the lounge room to go into the kitchen to make himself some toast. He had not seen the deceased for some four or five minutes by then.
120. When he entered the kitchen, Mr Dunstan noticed that the sliding glass door was open, so he went out into the

⁶⁴ ts 93-95

pool area. He saw his dogs near the pool and then saw the deceased floating face up in the pool.

121. Mr Dunstan pulled the deceased from the pool and screamed at Ms Newman to call for an ambulance. He and Mr Tirant, who had both been trained as senior first aid due to their jobs as security guards, applied cardiopulmonary resuscitation until ambulance officers arrived.
122. The ambulance officers took over the CPR and conveyed the deceased to hospital, but he could not be revived.
123. A post mortem examination was conducted by Chief Forensic Pathologist Dr C T Cooke who determined that the cause of death was immersion (drowning).

ROYAL LIFE SAVING SOCIETY - AUSTRALIA

124. The Royal Life Saving Society in Western Australia (**RLSSWA**) wrote to Counsel Assisting to provide relevant information, especially statistics.⁶⁵ They make the following important points.
125. Over the last four year barrier assessment cycle from 2008 to 2011, the RLSSWA assessed 27,928 home swimming pool barriers in 14 local government areas in both metro and rural Western Australia. On first assessment of those barriers, about 66% were compliant with the regulatory requirements. After three assessments over a 30 day period, almost 90% were compliant
126. Since mandatory assessments were introduced in 1991, the first assessment compliance rate improved for each four year inspection cycle until the last one in 2011.
127. The compliance rate for first assessment of pre-2001 barriers, which can have child resistant doors, is significantly lower than the compliance rate for post-

⁶⁵ Exhibit 3

2001 barriers (61.84% vs 69.89%). The difference is likely to be from malfunction from the age, wear and tear of the older barriers and the greater reliability of the newer barriers.

128. The RLSSWA observe that, apart from improving supervision of children, the greatest reduction in pool drowning of small children will be observed if barriers are installed and functioning properly.
129. Registration of spas and inflatable pools by local governments is not effective.
130. Toddler drowning deaths in WA in all locations decreased from 5.2 per year in the 2003 to 2007 assessment cycle to 3 per year in the 2007 to 2011 cycle.
131. In the 2007 to 2011 cycle, four children aged 0 to 5 drowned in home swimming pools and spas; each occurred in the metro area.
132. The number of hospitalisations in WA due to immersion incidents had increased significantly over the past five years for toddlers; from 23 in 2005 to 44 in 2011. Of those, it is estimated that 28% are likely to have some selective deficit and 3% will be in a permanent vegetative state.
133. Western Australia has led the way in Australia in relation to develop legislation and barrier standards. The compliance rate in WA is greater than in other jurisdictions, largely due to the introduction of mandatory inspections of swimming pools. Queensland and New South Wales only require a pool to be inspected on sale or lease of the property.
134. However, Queensland has an on-line state-wide pool registry and owners are required to register their pools or face fines. Such a system may assist in providing a means for temporary pools and off-the-shelf spas to be included in the inspection system.

135. The RLSS-WA also provided a copy of the RLSS-Australia National Drowning Report for 2012.⁶⁶ The statistics it provides for drowning deaths of children aged 0-4 indicates a reduction of 34% on the five year average. However, it may be that the figures will change once coronial findings have been completed. Swimming pools are the location where the highest number of drowning deaths occur in this age group.
136. The latest RLSS – Australia National Drowning Report 2013 was published after the inquest was held. That report indicated that the drowning deaths of children aged 0-4 increased dramatically since the last report and that the overwhelming majority of the deaths occurred in swimming pools following falls into the water. The report notes that New South Wales has recently enacted new legislation in relation to the provision and maintenance of appropriate pool barriers.
137. Another publication, the NSW Child Death Review Team Issues Paper of April 2012, has also been brought to my attention following the inquest. Part of that paper is ‘Child deaths: drowning deaths in private swimming pools in NSW’ relating to the period from 2007 to 2011. It makes disturbing reading, especially in the light of the evidence in this inquest, and amplifies the RLSS reports. The following points are from that paper.
138. Of 40 children who drowned in NSW over the period, 34 were under five years of age. Of those, 30 were three years or less. Most of the children drowned in pools at their own home. The majority of the pools (28) were fenced but 24 of them had defects with a gate or latch mechanism which resulted in the gate or fence jamming open.
139. All the children who drowned did so in the absence of adult supervision. The details of the circumstances of the deaths of 26 of those who were under five years of age were available. The majority (15) were unsupervised for 10 minutes or less, with some children being out of sight for five minutes or less.

⁶⁶ Exhibit 6

140. The message for parents and carers was to actively supervise young children in or around water and to inspect and maintain pool barriers to ensure that they are and remain child resistant.
141. The NSW Child Death Review Team noted that ‘supervise and restrict access’ are major components of the RLSS Australia’s Keep Watch program.
142. The message for government and policy makers was that careful consideration should be given to the following facts:
 - a. most children drowned in pools at their own home;
 - b. almost a quarter of the pools were above ground portable pools;
 - c. in all cases where the pool safety barrier was defective, the defects included issues with a gate and or latch mechanism; and
 - d. in many cases, children were unsupervised for a short period of time.

WHAT CONTRIBUTED TO THE DEATH

143. In my view, it is important to identify, if possible, what factors may have contributed to the death of the deceased in order to determine, if possible, whether or not changes can be made to procedures, systems, legislation or public information that may act to reduce the likelihood of such a tragedy from happening again.
144. This is not an exercise in attributing blame, but it is clear that the tragedy might not have occurred had circumstances been different.
145. The factors which I have identified are not listed in any particular order.

LACK OF SUPERVISION

146. The first factor was that of a breakdown of the supervision of the deceased. As Magistrate P.A. MacMahon, Deputy State Coroner in the New South Wales Coroner's Court, stated in the finding in the inquest into the death of Zane Robert Hill⁶⁷:

... a breakdown in the supervision of active and inquisitive children is always a contributing factor in drowning deaths. ...

It has to be accepted that young children cannot be observed every minute of the day. Parents are invariably required to undertake numerous other activities and even where they are caring and responsible, breakdowns in supervision do occur. That appears to be what has happened in this case.

147. Ms Newman and Mr Dunstan were both in the house with the deceased. The deceased was out of sight to both of them for only a matter of minutes. They were both aware that the sliding glass door was easily unlocked and that the sliding security door was either not, or not likely to be, in position to provide an effective barrier.

REMOVAL OF THE SECURITY DOOR

148. The second factor was the fact that the sliding security door was not in its appropriate position.
149. The NSW Child Death Review Team paper cited above contains the following:

Pool fences can never take the place of active supervision of children around pools, but where there is a lapse in supervision, a child resistant barrier can save lives.

⁶⁷ Delivered 26 October 2011; File No 1776/2010

150. While effective supervision is of primary importance, there is also a need for barriers like fences, security gates and doors because it is almost impossible for parents to maintain constant supervision of small children. That need is reflected by the existence of the legislative requirements discussed above.
151. The security door did not function properly, which led Mr Dunstan to attempt to fix it and, when unsuccessful, to regularly remove it and place it beside the house.
152. Mr Dunstan wanted access to the pool area in order to use the pool and, it appears, an equally strong motivation was to go outside to smoke cigarettes and the pool area was the most convenient place to do so. He could have gone outside to the back yard area through the games room door, but it was not as convenient or, I suspect, as comfortable.
153. Mr Dunstan was aware that the purpose of the security door was to ensure that children did not gain access to the pool, yet he chose to place his own convenience above the risk to the deceased.
154. It appears that Mr Dunstan mistakenly thought that the sliding glass door would provide a suitable barrier, but he was aware that it was easy to unlock that door and that the deceased could reach the latch.⁶⁸ I doubt that he seriously considered just how dire the consequences could be if the deceased were able to gain unsupervised access to the swimming pool.

MALFUNCTION OF THE SECURITY DOOR

155. A third and related factor was the fact that the sliding security door would not function properly even if it were attached. There are two underlying reasons for that. The first reason was that doors of that nature were prone to malfunction. The second reason was that the steps required to ensure that it did function properly were not

⁶⁸ ts 56

taken, despite requests made by the tenants to First National.

156. Mr Weise stated that sliding security doors such as the one at the house ‘ ... virtually always have significant problems and require significant maintenance. So they are probably the most common failing item when present and are very difficult to fix.’⁶⁹
157. That evidence accords with the evidence of Mr Baker who said that he had repaired the door prior to the new tenants moving into the house in October 2011, yet within weeks Ms Wynn Papas had noted that it kept coming off its rail.

STEPS NOT TAKEN

158. The security door was not fixed in time to protect the deceased because of a series of steps which in hindsight become significant. The steps required to fix the sliding security door would likely have been taken had any one of a number of things occurred, including:
 - A. The tenants could have notified the City of Kalgoorlie-Boulder pool inspectors who would have enforced the requirement to have the door working properly;
 - B. The tenants could have arranged to fix the door themselves;
 - C. The First National property managers could have identified the state of the sliding security door during an inspection and have either arranged to fix it or have notified Mr Baker of the need to fix it;
 - D. The First National employees who were notified by Ms Wynn Papas of the fact that the door kept

⁶⁹ ts 253

coming off its rail could have arranged to fix it or have notified Mr Baker of the need to fix it;

E. The First National employees who were notified by Mr Dunstan of the fact that the door's roller was broken and the auto return was a problem could have arranged for the door to be fixed or have notified Mr Baker of the need to fix it; and

F. Mr Baker could have taken urgent steps to arrange for the door to be fixed after being notified by Ms Kolatowicz that the auto return was a problem.

159. As to A, the tenants were not aware that they could have notified the pool inspectors about the state of the sliding security door. Their right to notify the inspectors as well as to complain to First National could easily have been brought to their attention when they entered the lease.

160. As to B (the tenants fixing the door themselves), as noted earlier, the tenancy agreement between the new tenants and the Bakers contained a term prohibiting the tenants from undertaking or authorising repairs without the prior written consent of the Bakers, and the provision of the *Residential Tenancies Act 1987* that would require compensation by the owner to the tenant for making urgent repairs did not apply to the agreement.

161. Since 1 July 2013 the option of the parties to contract out of the requirement to provide compensation for urgent repairs has been removed. The standard form of residential tenancy agreement provided in the *Residential Tenancies Regulations 1989* now contains a clause providing for urgent repairs to be arranged by the property manager or, failing that, for the tenant to arrange for repairs and then to be reimbursed for the expense of doing so.⁷⁰

162. From the perspective of endeavouring to ensure that pool safety barriers are in place to protect children from drowning, the amendments to the *Residential Tenancies*

⁷⁰ Schedule 4 Clause 22

Act 1987 and the Residential Tenancies Regulations 1989 are welcome.

163. As to C, D and E (First National arranging to fix the door or notify Mr Baker), of the First National employees who either carried out inspections of 177 Hare Street Piccadilly or were notified of the poor state of the sliding security door, it seems that only Ms Wilson appreciated the danger that it posed. None of the employees had been trained to assess whether pool safety barriers were at all effective or compliant with the legislative requirements.
164. Mr Gilmore expected property managers carrying out inspections to report hazardous situations and get instructions from the owner to rectify them.⁷¹ While that seems a reasonable and socially responsible expectation, it was unlikely to be realised in practical terms if the property managers were not trained to identify hazards.
165. That was appreciated by Mr Gilmore. He had no objection to a process by which estate agents would inspect pool barriers with a view to identifying hazards, but he was concerned with the question of the depth to which an inspection would be expected to be.⁷² He said that most property managers probably would not have the knowledge to assess pool barriers without significant training.⁷³
166. As to F (Mr Baker taking urgent steps), the Bakers appear to have placed a great deal of reliance on First National to manage the property for them. This is, perhaps, understandable given that they no longer lived in Kalgoorlie and were busy with other matters, but it provides no excuse for a failure to ensure that the pool barriers were functioning properly. I do not accept as reasonable Mr Baker's implied excuse that the sliding glass door provided a barrier to the pool area.

⁷¹ ts 177

⁷² ts 181

⁷³ ts 180-181

167. Mr Baker was aware of his responsibility to repair the sliding security door irrespective of whether a child was living at the house, but his understanding that the tenants were 'two gentlemen' led him to consider that there was no urgency to do so. There is no evidence to suggest that his delay was due to any financial reason.
168. First National was aware that the deceased was living at the house with Ms Newman, but it seems that this information was not passed along to Mr Baker. Whether that information would have caused Mr Baker to have acted differently had he been aware of it was not explored at the inquest, but Mr Baker's testimony about his grandchildren not being allowed to use the sliding security door when visiting the house when the Bakers lived in it leads me to think that he would have been more diligent in fixing the door had he known that the deceased was living there.
169. Of course, whether a child was living at the house should have made no difference to Mr Baker because, not only was his responsibility not dependent upon whether a child lived at the house, there was always a possibility that a child might visit the tenants.
170. It seems to me that, as with Mr Dunstan, Mr Baker failed to consider sufficiently just how serious the consequences might be if the sliding security door did not work properly.
171. As mentioned, while the supervision and education of children may be their first layer of protection from drowning in a backyard pool, there will be times when a physical barrier will be the last layer. The importance of an effective barrier cannot be overstated.
172. One would think that owners of properties on which there are swimming pools would be aware of the hazard that the pools pose to children and would take appropriate precautions to protect children from that hazard. Legislation has been enacted for that purpose, but the statistics cited above indicate clearly that more needs to be done to encourage pool owners to fulfil their obligations.

173. The fact that summer is approaching gives that need some urgency.

RECOMMENDATIONS

174. Section 25(2) of the *Coroners Act 1996* empowers a coroner to comment on any matter connected with a death including public health or safety. The practice in this Court is to use that power to make recommendations aimed at reducing the likelihood of other deaths occurring in similar circumstances.
175. The evidence suggests that a first step in reducing that likelihood would be to bring to the attention of parents and others who are responsible for the safety of young children the fact that even a brief breakdown in supervision around swimming pools can have tragic consequences, and to exhort them to take steps to ensure that such breakdowns do not occur.
176. The inquest did not receive evidence directly related to how such a public awareness process could or should be done. However, it is not difficult to envisage a public awareness campaign involving mail-out pamphlets or advertising. Local governments appear to be well-placed to put one in place, and an annual reminder to occupiers and rate-payers enclosed in the rates notice may be a practicable method.
177. Such a process could and should also include reference to the need to ensure that proper barriers are in place around swimming pools as the second layer of protection for young children. In particular, owners and occupiers of properties where sliding security doors form part of the barriers should be informed of the problematical nature of that type of door and the need to ensure that the self-closing and latching function is maintained.
178. In addition, reference to the dangers inherent in portable or inflatable pools and spas should be included.

RECOMMENDATION 1

Local Governments consider implementing a regular public awareness process to remind persons responsible for children of the importance of maintaining proper supervision where the children may have access to swimming pools and for the need for proper pool safety barriers to be provided and maintained.

179. Given the importance of barriers to the safety of children around swimming pools, it is not difficult to see why the use of sliding security doors as barriers to direct access from houses is being phased out in Queensland. It is not clear why the BR 2012 did not also remove the use of such doors in Western Australia, or why the discussion paper published by the Building Commission does not raise that removal as a proposal.
180. No doubt there are factors of cost and convenience associated with removing the use of sliding security doors, and there may be other factors of which I was not made aware. In these circumstances, I make the following recommendation in less vigorous terms than may actually be warranted.

RECOMMENDATION 2

The Building Commission consider adopting a proposal to phase out the use of child resistant doors as barriers between houses and swimming pools.

181. As noted, tenants could be made aware of their right to notify local government pool inspectors with concerns about the compliance of their pool safety barriers with the relevant legislation.

182. Notifying a tenant of the right to notify the local government of an issue related to swimming pool barriers would not give the tenant anything at a cost to the owner, nor would it take anything from the owner, so an owner could hardly object. An example of how it might be done would be to include in the documentation provided to a new tenant a card or pamphlet outlining the tenant's rights.

RECOMMENDATION 3

The Western Australian Local Government Association consult with REIWA with a view to adopting a process whereby new tenants at properties at which there is a pool are notified of their right to notify local government as well as to the estate agent about matters relating to the safety of the pool.

183. Prior to the inquest, Counsel Assisting had notified REIWA of two recommendations which might be considered at the inquest. The first possible recommendation was for inspections by property managers to include an assessment of swimming pool safety barriers and of what should be done to rectify a non-compliant barrier. REIWA's response was that real estate agents are not trained in the assessment of pool safety barriers and that requirements of the barriers differ with the year the pool was built, so assessment would have to be performed by a trained person.⁷⁴

184. In his oral evidence, Mr Weise stated that if, when conducting inspections, estate agents could be alert to some of the major issues, such as the presence or absence of a barrier of a reasonable height, whether the gate is self-closing and latching and the height of the latch, it would go a long way in terms of improving safety.

⁷⁴ Exhibit 2

185. It seems to me that training property managers to be aware of these basic issues would not be onerous. Nor would it be difficult to contain reference to these issues on standard inspection forms such as the lessor routine inspection forms used by First National.
186. This would not require estate agents to determine whether pool barriers comply with the relevant legislation. Rather, it would be a slight increase in the extent of the current level of inspection. For example, Ms Wilson noted that at first inspection of a property she would check fences and would notice if pool gates did not close.⁷⁵ It is difficult to see why, in the context of the public interest in protecting children from drowning, it would be prohibitively onerous for similar checks to be undertaken in a systematic way on routine inspections.
187. While I am aware that estate agents may not wish to take on a legal responsibility with consequent potential liability by being responsible to conduct pool safety inspections when carrying out property inspections, the fact that they carry out regular and reasonably frequent property inspections places them in a unique position to check on some basic aspects of pool barriers and thereby provide a layer of safety for children.
188. Given the legal requirement on owners to maintain pool barriers, it seems reasonable that owners would also benefit from estate agents checking on the state of pool barriers on their behalf.
189. The evidence of the property managers at First National was that they had received training from REIWA on the role of property manager, but that the training did not include pool barrier safety.⁷⁶
190. If property managers were trained to be aware of issues related to pool barrier safety, they might also be more likely to be concerned if they were notified by tenants of matters that could affect those issues. For example, if the First National employees who had seen Ms Wynn

⁷⁵ ts 107

⁷⁶ For example: ts 105-106, 153, 158

Papas' note about the sliding security door had been trained about the relevant issues, they would have been more likely to have done something about it.

191. The basic requirements of pool barriers identified by Mr Weise are not numerous or complicated or difficult to understand. However, REIWA was not asked to comment on a proposal that it facilitate the training of property managers to identify pool barrier safety issues, so there may be reasons why such a proposal would not be practicable. I therefore make the relevant recommendation in the following terms.

RECOMMENDATION 4

REIWA consider taking the appropriate steps to train property managers about the fundamental requirements of pool safety barriers and to encourage them to include basic assessments of such barriers when conducting property inspections.

192. Mr Weise also raised an issue with the BR 2012 in that the regulations pertaining to swimming pools only applies to pools containing 300mm of water. As noted earlier in this finding, the definition of swimming pool refers to a place which has the capacity to contain water that is more than 300mm deep. This anomaly allows the regulatory scheme to be circumvented by owners or occupiers who can drain a pool to less than 300mm deep when faced with an inspection.
193. Because that issue is not related to the death in this case, I mention it only in passing but with the hope that it will be considered by those responsible for amendments to the BR 2012. Similar mention could be made of the problems involving regulation of inflatable and portable pools.

CONCLUSION

194. There is no doubt that the deceased died from immersion and that the manner of his death was accident.
195. A series of circumstances contributed to this preventable tragedy.
196. In my view, the central factor contributing to the death was a failure at both an individual and a systemic level to place sufficient importance on the need to ensure that an effective pool safety barrier was in place.

B P King
Coroner

30 October 2013