



**STATE CORONER'S COURT
OF NEW SOUTH WALES**

Inquest: Inquest into the death of Jake Rhodes

Hearing dates: 21 & 22 February 2018 at Newcastle

Date of findings: 27 February 2018

Place of findings: NSW State Coroner's Court, Glebe

Findings of: Magistrate Derek Lee, Deputy State Coroner

Catchwords: CORONIAL LAW – near drowning, swimming pool, *Swimming Pools Act 1992*, temporary pool fence, pool construction process, Complying Development Certificate, Final Occupation Certificate, Narellan Pools Northern Rivers, Ballina Shire Council, Australian Standard AS 1926, Building Code of Australia, National Construction Code

File number: 2015/24644

Representation: Mr L Fernandez, Counsel Assisting, instructed by Mr J McLachlan, Crown Solicitor's Office

Mr M Down for Ballina Shire Council

Findings: I find that Jake Rhodes died on 17 January 2015 at Lady Cilento Children's Hospital in South Brisbane, Queensland. Jake died from hypoxic-ischaemic encephalopathy. Jake's death was due to misadventure when he was involved in a near-drowning incident in a backyard swimming pool at Pimlico, NSW on 16 January 2015.

Recommendations:

To the General Manager of Ballina Shire Council:

1. I recommend that consideration be given to ensuring that correspondence relating to the granting of a Complying Development Certificate for the construction of a swimming pool, and all conditions relating to such a Certificate, are sent directly to swimming pool owners.

To Bragg Enterprises Pty Ltd, trading as Narellan Pools Northern Rivers:

2. I recommend that consideration be given to including within the Client Acknowledgement of the Narellan Pools Pool Owner's Manual, explicit written instructions that a pool is not to be used until a Final Occupation Certificate has been issued by a consent authority, a local council, or an accredited certifier.

To the Minister for Innovation and Better Regulation:

3. I recommend that a copy of these findings be provided to the Minister for Innovation and Better Regulation and that, having regard to these findings, consideration be given to amending the *Swimming Pools Act 1992* and *Swimming Pools Regulation 2008* to provide for warning notices to be erected and maintained during the construction of a swimming pool, which stipulate that a swimming pool is not to be occupied or used until a Final Occupation Certificate by a certifying authority is issued.

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Introduction

1. On the morning of 16 January 2015 Jake Rhodes, a spirited and adventurous little boy, was doing what thousands of children in NSW do during every summer: having fun by swimming in a backyard pool with his family and friends. Tragically, only a short time later, Jake would be in an ambulance on his way to hospital after being found floating in the pool and unresponsive. Jake died the following day. He was only 21 months old.

Why was an inquest held?

2. Under the *Coroners Act 2009* (the Act) a Coroner has the responsibility to investigate all reportable deaths. This investigation is conducted primarily so that a Coroner can answer questions about the identity of the person who died, when and where they died, and what was the cause and the manner of their death. All reportable deaths must be reported to a Coroner or to a police officer. One type of reportable death is what the Act describes as an unnatural death.¹ Usually an unnatural death means where a person has died from other than natural causes and where some external factor has contributed to that person's death. Jake did not die from natural causes which means that, according to the Act, his death was unnatural. On one view the death of any child, particularly one as young as Jake, should never be regarded as natural. No parent, grandparent, sibling, aunt or uncle should ever have to experience the anguish and trauma of losing a child.
3. In Jake's case the coronial investigation gathered sufficient evidence to answer the questions about Jake's identity, where and when he died, and the medical cause of his death. The inquest was primarily focused on the manner of Jake's death. That is, what were the circumstances surrounding, and leading up to, his death and did these circumstances in way contribute to it?
4. Inquests also have a forward-thinking, preventative focus. At the end of many inquests Coroners often exercise their power under section 82 of the Act to make recommendations. These recommendations are made to, usually, government and non-government organisations in order to address systemic issues that are highlighted and examined during an inquest. Recommendations in relation to any matter connected with a person's death may be made if a Coroner considers them to be necessary or desirable.
5. The coronial investigation into the death of a person is one that, by its very nature, occasions grief and trauma to that person's family. The emotional toll that such an investigation, and any resulting inquest, places on the family of a deceased person is enormous. A coronial investigation seeks to identify whether there have been any shortcomings, whether by an individual or an organisation, with respect to any matter connected with a person's death. It seeks to identify shortcomings not for the purpose of assigning blame or fault but, rather, so that lessons can be learnt from such shortcomings and so that, hopefully, these shortcomings are not repeated in the future. If families must re-live painful and distressing memories that an inquest brings with it then, where possible, there should be hope for some positive outcome. The recommendations made by Coroners are made with the hope that they will lead to some positive outcome by improving general public health and safety.

¹ *Coroners Act 2009*, section 6(1)(a).

Jake's life

6. Inquests and the coronial process are as much about life as they are about death. Recognising the impact that a death of person has had on their family of that person can only serve to strengthen the resolve we share as a community to strive to reduce the risk of preventable deaths in the future. Understanding the impact that a death of a person has had on their family only comes from knowing something of that person's life and how the loss of that life has affected those who loved that person the most. Therefore it is extremely important to recognise and acknowledge Jake's all too brief, but important, life.
7. Jake was born to Leanne and Rodney Rhodes and was the youngest of their 4 children. Apart from Jake's death, Ms Rhodes describes Jake's birth as being one of the hardest things that she has had to endure but one that was, in her words, worth every minute.
8. Jake was a confident, boisterous and adventurous little boy. His parents and his siblings – Lani, Roy and Kayla – had an enormous love for him. Ms Rhodes said that Jake taught her many things: love, strength and, most of all, patience. Mr Rhodes described having a special relationship with Jake, his cheeky little monkey.
9. Although his life was all too brief, Jake brought much joy and happiness to those around him. To know that Jake's parents and siblings will no longer be able to see Jake's blue eyes and golden hair, hear his laughter, and hold him is extremely distressing.
10. It is also heartbreaking to know that Jake's parents, his siblings and the rest of Jake's family, will never be able to see him grow up, to share celebrations and memorable occasions with him, and to have their lives enriched by his presence. Of course, there is no doubt that Jake's memory and his adventurous spirit will not be forgotten by those who love him, and miss him, most.

Background to the events of 16 January 2015

11. On 9 January 2015 Mr Rhodes went to stay with an old friend, Danielle Forsythe. Ms Forsythe lived at 870 Pimlico Road, Pimlico, south-west of Ballina, with her 2 children, Shayni (9 years old) and Ewan (8 years old). Mr Rhodes was travelling with his 4 children: Lani (13 years old), Roy (12 years old), Kayla (5 years old) and Jake. They were on holidays together and planned to visit the children's grandparents who lived in the Northern Rivers region.
12. Between 2 and 5 December 2014 Ms Forsythe had a pool built at her house. Bragg Enterprises Pty Ltd, trading as Narellan Pools Northern Rivers² (**Narellan**) built the pool and handed it over to Ms Forsythe on 8 December 2014. Sometime in the week of 5 January 2015 Ms Forsythe spoke to a neighbour about building a permanent fence around the pool. Ms Forsythe later made arrangements for the fence to be built by two acquaintances, but this did not go ahead as they became unavailable to do the work. Instead, Mr Rhodes (who was a licensed plumber) and one of Ms Forsythe's neighbours, Cameron Vaughan, took on the task of building the fence. Mr Rhodes and Mr Vaughn worked on the fence in the days leading up to 16 January 2015.

² A franchisee of Narellan Pools Pty Ltd.

What happened on 16 January 2015?

13. On the morning of 16 January 2015 Mr Rhodes and Mr Vaughn re-commenced working on the pool fence at some time around 11:00am. Much of the work involved using machinery to compact the ground surrounding the pool. Sometime after the men began work, some of the children went swimming in the pool: Jake, Roy, Kayla, Shayni and Ewan. At the time Jake was wearing a small, pink-coloured life vest designed for children as he could not swim unassisted.
14. At around midday Ms Forsythe, accompanied by Lani, left her home to go to the hardware store in Ballina to pick up some fencing supplies for Mr Rhodes. A short time later, two of Ms Forsythe's friends, Shelley Keenan and Angeline Gibson, arrived at the house. They had made previous arrangements to meet with Ms Forsythe and Mr Rhodes that day. Ms Keenan and Ms Gibson had brought some food for lunch with them. After arriving, they set up lunch on a table on the outside veranda area which was located about 20 feet from the pool.
15. At this time, Jake was no longer swimming as Mr Rhodes had taken him out of the pool a short time earlier. Shayni and Kayla were, however, still in the pool whilst Ewan and Roy were by this time inside the house playing video games.
16. Ms Keenan made a sandwich for Jake and gave it to him. The girls got out of the pool at this time to have some lunch as well, along with the adults. After finishing his sandwich, Ms Keenan offered Jake some more food but she recalls that he walked away from the veranda area. At around 12:23pm Ms Gibson received a call on her mobile phone and also left the veranda area to look for better mobile phone reception.
17. Ms Keenan began to pack up lunch and take the food back inside the house. She also went to her car in order to retrieve her cigarettes. On her way to and from the car Ms Keenan walked past Ms Gibson. When Ms Keenan returned to the table on the veranda she saw what she thought was "*a big doll*" in the pool before she realised that it was Jake.³ Ms Keenan screamed out. Ms Gibson heard the scream and ran to the pool area.
18. Mr Rhodes' recollection of this period of time is different to Ms Keenan's. Mr Rhodes said that after eating lunch, he left the veranda area to go cut some wood in a shed on Ms Forsythe's property. When he returned a short time later Ms Keenan and Ms Gibson asked where Jake was. Mr Rhodes was unable to see Jake and then one of the ladies screamed out that Jake was in the pool.⁴
19. Mr Rhodes immediately dove into the pool to retrieve Jake and noticed that Jake was not wearing his life vest. At the same time Ms Keenan made a call to triple 0 at 12:36pm. Mr Rhodes placed Jake in the recovery position on a towel near the edge of the pool. Mr Rhodes cleared Jake's airway and saw water come out of Jake's mouth. Jake was unresponsive and not breathing. With the help of Ms Gibson, Mr Rhodes began cardiopulmonary resuscitation (**CPR**) following the instructions of the emergency operator that were relayed to him by Ms Keenan.
20. In response to the emergency call, paramedics and police officers arrived at the scene a short time later. They continued CPR in an attempt to revive Jake who by that stage was still not breathing. An air ambulance helicopter arrived at the property shortly after 1:00pm with

³ Exhibit 1, tab 12 at [25].

⁴ Exhibit 1, tab 11, page 11.

paramedics and an emergency registrar, Dr Rosemary Stratford, on board. They reached Jake at about 1:15pm and noted that he had been in cardiac arrest for approximately 45 minutes.

21. A decision was made to take Jake to Lismore Base Hospital by road. Paramedics with a police escort left Ms Forsythe's home at about 1:38pm. The paramedics continued CPR in the ambulance along the way. Shortly before the ambulance arrived at Lismore Base Hospital at about 1:59pm, Jake's heart restarted. He was placed on a ventilator but remained unresponsive. Jake was stabilised at Lismore Base Hospital but remained on the ventilator and needed medication to maintain his blood pressure.
22. At 4:36pm Jake was taken by helicopter to Lady Cilento Children's Hospital in South Brisbane, Queensland, arriving at 5:21pm. Jake was admitted to the Intensive Care Unit, however his condition was becoming increasingly unstable. A CT later showed that Jake had significant brain swelling and lack of blood flow. These findings were considered to be consistent with brain death. After Jake's family were given the opportunity to visit him one last time he was removed from the ventilator and died at 8:00pm on 17 January 2015.

What was the cause of Jake death?

23. As Jake died in a Brisbane hospital his death was initially reported to the Queensland Coroner. The postmortem examination was conducted by a senior forensic pathologist from Queensland Health, Dr Nathan Milne on 21 January 2015.
24. Dr Milne noted that there was a long period of time, some 90 minutes, from when Jake was found unresponsive, after being taken out of the pool, until he developed spontaneous cardiac activity, shortly before arriving at Lismore Hospital. Dr Milne explained that during this time Jake's brain would have been significantly damaged by lack of blood and oxygen. Ultimately Dr Milne concluded that the cause of Jake's death was hypoxic-ischaemic encephalopathy (permanent brain damage from lack of oxygen) due to near-drowning.⁵

What was the manner of Jake's death?

25. This question is primarily concerned with understanding the circumstances immediately leading up to Jake being found in the pool on 16 January 2015. That is, how was Jake able to gain access to the pool and nearly drown whilst in it on 16 January 2015?
26. On 16 January 2015 there was a temporary steel fence surrounding the pool. Ms Forsythe had hired the fence from a hire company in Ballina. The fence consisted of 13 panels which were secured together with metal clasps. The fence did not have a gate attached to it.
27. Up until 15 January 2015 it appears that the fence had been erected on the ground around the perimeter of the pool. However, on 15 January Mr Rhodes and Mr Vaughan moved the fence and positioned it so that it was sitting on top of the pool coping. This was done, presumably, to allow Mr Rhodes and Mr Vaughan to work on compacting the ground close to the coping of the pool so that the permanent fence, which they were working on, could be built.
28. The moving of the fence onto the pool coping meant that the fence did not completely seal off the pool from access, particularly by a small child. The straight lines of some of the fence panels

⁵ Exhibit 1, tab 5.

meant that when the fence was sitting on the pool coping, small sections of the pool protruded out from underneath the base of the fence.⁶ This in turn meant that on 16 January 2015 it could have been possible for Jake to have entered the pool via one of these gaps in the line of the temporary fence.

29. In addition, some of the police officers who attended the scene on 16 January 2015 noticed that one of the panels of the temporary fence had been opened to permit access to the pool.⁷ It appears that this had been occurring in the days leading up to 16 January 2015 as a way to allow Mr Rhodes' and Ms Forsythe's children to swim in the pool. Although the temporary fence did not have a gate it seems that clasps on the fence were removed to allow a panel of the fence to be lifted up and off a hinge so that the panel could be opened, acting as a type of makeshift gate. However, this makeshift gate did not have the capacity to self-close. Instead, Ms Forsythe said that in the days preceding 16 January 2015 she (and presumably Mr Rhodes) had been making sure that any opened fence panel was closed every night.⁸
30. Mr Rhodes said that he opened one of the fence panels on 16 January 2015 to allow the children to swim in the pool that morning.⁹ However, he said that whilst at some stage he pushed the panel back into a closed position (probably when the children exited the pool to have lunch), he did not lift the panel up and place it back on its hinge.¹⁰ Ms Forsythe also said in evidence that one of the fence panels had been opened by either Mr Rhodes or Mr Vaughan on the morning of 16 January 2015 before she left for Ballina, and the panel was still in the open position when she returned home.¹¹
31. Jake had been wearing his life vest whilst swimming on the morning of 16 January 2015. There is some inconsistency in the witness accounts about whether his life vest was taken off when he went to eat lunch. Mr Rhodes said that when he got Jake out of the pool for lunch he took Jake's life vest off.¹² However, Ms Keenan said that when she gave Jake a sandwich she recalls that he was wearing his life vest at the time.¹³ Ms Gibson also recalls that Jake was wearing a flotation vest when she saw him at lunchtime.¹⁴ Jake's life vest was later found by one of the attending police officers to be lying on top of some fencing equipment in the veranda area of the house.¹⁵

32. **CONCLUSION:** It is not exactly clear how Jake was able to gain access to the pool on 16 January 2015. It is possible that he could have entered the pool via a gap in the temporary fence line, which was created when the fence was moved to sit on top of the pool coping on 15 January 2015. However, I conclude that it is more probable that Jake gained access to the pool through a panel of the fence which had been left partially open. This is because earlier in the morning on 16 January 2015, and in the days leading up to it, it had been common practice for the fence to be left open in this way to allow the children to enter the pool and swim in it. It also seems that entering the pool via a partially open fence panel would have been easier than by swimming underneath the fence line.

⁶ Exhibit 1, tab 21, photos 11-15.

⁷ Exhibit 1, tab 16 at [7]; tab 18 at [8].

⁸ Exhibit 1, tab 14 at [22].

⁹ Exhibit 1, tab 11, pages 1, 15.

¹⁰ Exhibit 1, tab 11, page 15.

¹¹ Exhibit 2, photo 2.

¹² Exhibit 1, tab 11, page 10.

¹³ Exhibit 1, tab 12 at [19].

¹⁴ Exhibit 1, tab 13 at [27].

¹⁵ Exhibit 1, tab 16 at [10]; Exhibit 1, tab 21, photo 21.

33. There is conflicting evidence about whether Jake was wearing his life vest after he got out of the pool before lunch. Regardless of which of the versions of events is correct, what is clear is that that Jake was not wearing his life vest when he was recovered from the water.

34. The fact that no person present on 16 January 2015 saw how Jake was able to gain access to the pool after lunch clearly establishes that he was not supervised in the moments before he was seen in the pool. This absence of supervision, together with the absence of a life vest and the opening of the temporary fence were all contributing factors to Jake's death. Having regard to these matters, I therefore conclude that the manner of Jake's death was misadventure.

What happened during construction of the pool?

35. On 8 October 2014, Ms Forsythe signed a contract with Narellan for the construction of a 9 metre fibreglass pool at her home. As construction of the pool amounted to a development of Ms Forsythe's property, approval was required for its construction. To obtain this approval, a Complying Development Certificate application (**the CDC application**), signed by Ms Forsythe on 27 October 2014, was lodged with Ballina Shire Council (**Ballina Council**) and received by them on 31 October 2014.¹⁶

36. On 4 November 2014 the application was approved and a Complying Development Certificate (**CDC**) was issued by Ballina Council.¹⁷ A letter of the same date (**the CDC letter**) was sent by Ballina Council to Ms Forsythe. The purpose of the letter was to advise Ms Forsythe about three mandatory inspections that were required during different stage of the pool construction process: when the pool ring beam¹⁸ was formed, when the pool fence was installed and before the pool was filled with water, and on completion of the pool and the fence before it was used and before an occupation certificate was issued.¹⁹

37. The letter also contained the following instruction:

"Please note, the pool is not to be filled with water, occupied or used until a Final Occupation Certificate has been issued by Council".²⁰

38. Excavation work at Ms Forsythe's home began on 2 December 2014. On the same day the fibreglass pool shell was placed in the ground and the shell partially filled with water. Mr Bragg indicated that, as part of the construction process, it was routine practice for a fibreglass pool shell to be filled to 10-15% of its capacity. On 3 December 2014 back fill around the pool was completed. It was indicated by Mr Bragg that at this stage the pool would have been filled to close to 100% of its capacity. The evidence at inquest established that the filling of the pool with water on both the first and second day of construction was a procedure particular to fibreglass pools. This is because filling of such pools with water during the construction process is necessary to prevent deformation of the fibreglass shell and to prevent it from rising up from the ground. This second type of issue is common in areas with a high water table level, Pimlico.

39. Narellan then made arrangements for Ballina Council to conduct the first of the 3 mandatory inspections referred to in the CDC letter. This inspection took place on 4 December 2014 and

¹⁶ Exhibit 1, tab 42B.

¹⁷ Ibid.

¹⁸ A concrete beam surrounding the pool that maintains the pool's structural integrity.

¹⁹ Exhibit 1, tab 42.

²⁰ Ibid.

was conducted by Neil Stone, a building surveyor in Ballina Council's Building Services Section. As part of the inspection process, Mr Stone took a number of photos which indicate that the pool was filled with water by this stage.

40. In a retrospective file note written on 28 January 2015, Mr Stone noted that when he conducted the inspection on 4 December 2014 there was a temporary pool fence surrounding the pool area but that "*a section of the fence had been temporarily removed to enable the contractors to complete laying reinforcement steel and formwork to the bond beam*".²¹ Mr Stone also noted that "*the removed fencing panels were stacked on the ground close to the pool area in readiness to be reinstalled following completion of work on the bond beam*".²²
41. On 5 December 2014 concrete was poured around the edge of the pool. No work was performed during the weekend of 6 and 7 December 2014.
42. By 8 December 2014 construction of the pool was complete. On this day Narellan completed a handover of the pool to Ms Forsythe. At this time the pool was filled with water near to its capacity, the pool water pH levels had been balanced, and the pool filtration system was operating. The temporary fence used during the construction process had been left around the perimeter of the pool.

What was the relevant legislative framework?

43. Section 7 of the *Swimming Pools Act 1992* (**the Pools Act**) relates to outdoor swimming pools. It provides:
 - (1) *The owner of the premises on which a swimming pool is situated must ensure that the swimming pool is at all times surrounded by a child-resistant barrier:*
 - (a) *that separates the swimming pool from any residential building situated on the premises and from any place (whether public or private) adjoining the premises; and*
 - (b) *that is designed, constructed, installed and maintained in accordance with the standards prescribed by the legislation.*
44. Importantly, section 6 of the Pools Act provides that Section 7 applies to "*outdoor swimming pools that are situated, **or proposed to be constructed or installed**, on premises on which a residential building is located*" (emphasis added). This meant that during the construction process there was a requirement for Ms Forsyth's pool to be surrounded by a child-resistant barrier.
45. Section 3 of the Pools Act relevantly defines a barrier to mean "*a fence or wall*". Clause 5 of the *Swimming Pools Regulation 2008* (**the Pools Regulations**) provides that the prescribed standards referred to in section 7(1)(b) of the Pools Act are the standards set out in the *Building Code of Australia* (**BCA**).

²¹ Exhibit 1, tab 42B.

²² Ibid.

46. The BCA comprises Volumes One and Two of the National Construction Code (**NCC**). The NCC is a uniform set of technical provisions for building work (and plumbing) throughout Australia and provides the minimum set of requirements for safety and health, amongst other things, in the design and construction of new building work. At the time of Jake's death the 2014 version of the BCA was in force.

47. Performance Requirement 2.5.3 of the BCA provides:

A barrier must be provided to a swimming pool and must:

(a) Be continuous for the full extent of the hazard; and

(b) Be of a strength and rigidity to withstand the foreseeable impact of people; and

(c) Restrict the access of young children to the pool and the immediate pool surrounds; and

(d) Have any gates and doors fitted with latching devices not readily operated by young children, and constructed to automatically close and latch.

48. Part 3.9.3.0 of the BCA provides that the above Performance Requirement 2.5.3 is satisfied if it has safety barriers installed in accordance with Australian Standard AS 1926 Parts 1 and 2 (**AS 1926**).

49. According to the preface of AS 1926, its objective "*is to assist pool owners/users in avoiding pool-related drowning by providing design, construction and performance of various barrier options, which are designed to restrict entry to the swimming pool area by young children*". Section 2.1 of AS 1926 provides that "*a barrier shall be designed and constructed so that it will restrict access by young children*" and that "*the barrier shall be a permanent structure*". Section 1.3 of AS 1926 defines a barrier to be "*the assembly of components, natural or otherwise, that restricts access to the pool*" and can include items such as fences, posts and panels, gates and door sets. Section 1.2 also defines a permanent structure to be "*a barrier, or part of a barrier which cannot be removed without the use of tools*". Section 2 of AS 1926 goes on to prescribe the design and construction elements of a barrier, such as its height, as well as to prescribe the fitting of gates with a self-closing device.

50. I interpret, from all of the above, that up to 15 January 2015:

(a) Ms Forsythe's pool was one to which section 7 of the Pools Act applied;

(b) Accordingly, it was a requirement that Ms Forsythe's pool be surrounded by a child-resistant barrier before a Final Occupation Certificate could be issued;

(c) The fence hired by Ms Forsythe arguably amounted to a permanent structure for the purposes of AS 1926 as it could not be removed without the use of tools – the evidence at inquest established that the fence panels were bolted together;

(d) It appears that the structure of the temporary fence itself, along with its physical dimensions, complied with the design and construction elements provided for in AS 1926.

(e) There was no requirement, under either the BCA or AS 1926, for the fence hired by Ms Forsythe to have a gate fitted with a self-closing device.

51. Ms Forsythe was provided notice about her obligations in two ways. Firstly, Note 1 to Section 1 of the CDC stipulated that “*a child-resistant barrier must be constructed or installed in accordance with the requirement of*” the Pools Act.²³ Secondly, Special Condition 4 of the contract between Ms Forsythe and Narellan provided that Ms Forsythe was required to “*supply and maintain a temporary (or permanent) child resistant barrier in accordance with*” the Pools Act.²⁴

52. **CONCLUSION:** The structure and physical dimensions of the fence hired by Ms Forsythe appears to have complied with AS 1926. Although it was regarded as a temporary fence that was only to be in place until a permanent fence could be constructed, it was arguably a permanent structure for the purposes AS 1926. However, although it could not be removed without the use of tools, its temporary nature meant that it could be disassembled and then reassembled. This occurred during the construction process to allow access to the pool itself and its surrounds, as noted by Mr Stone during his inspection on 4 December 2014. At the handover of the pool on 8 December 2014 the temporary fence had been reassembled and positioned so that it surrounded the perimeter of the pool. However, the moving of the fence and its position on the morning of 16 January 2015, on top of the pool coping and with a fence panel left unsecured, led to a situation where the fence’s structure was ineffective in preventing access to Ms Forsythe’s pool.

Should anyone have been swimming in the pool on 16 January 2015?

53. By 16 January 2015 Ballina Council had not issued a Final Occupation Certificate for Ms Forsythe’s pool. In effect, this meant that the pool should not have been used on that day. That is, no person should have been swimming in the pool on that day. The obvious consequence of this is that, now reflecting back with the benefit of hindsight, if the pool had not been used on 16 January 2015, Jake would not have drowned.

54. However, the evidence gathered established that not only was the pool used on 16 January 2015, but that it had also been used on more than one occasion since 8 December 2014. In fact, the specific evidence from Ms Forsythe is that her children, and Mr Rhodes’ children, had been swimming in the pool in the week preceding 16 January 2015. In the period after Mr Rhodes arrived at Ms Forsythe’s house, Jake had swam in the pool, whilst wearing his life vest, without any incident.²⁵ Indeed Ms Forsythe recalls that Jake was able to swim from one end of the pool to the other during the week leading up to 16 January 2015.

55. The obvious question from all of this is: why did this happen? The answer comes from, I think, two sources. One is the CDC letter. The other is the handover which Narellan which conducted with Ms Forsythe on 8 December 2014.

The CDC letter issued by Ballina Council

56. The CDC letter is addressed to Ms Forsythe. However the address on the letter is Narellan’s business address. This is because the CDC application was lodged on Ms Forsythe’s behalf by

²³ Exhibit 1, tab 43, page 3.

²⁴ Exhibit 1, tab 41, page 6.

²⁵ Exhibit 1, tab 14 at [21].

Narellan. There was nothing unusual about this. The evidence at inquest established that this was a common practice for Narellan to follow when a customer engaged its services to build a pool. As a result of Narellan lodging the CDC application Ms Forsythe was nominated as the applicant but the address given was Narellan's. The evidence established that a copy of the CDC letter, addressed to Ms Forsythe, was not sent separately to Ms Forsythe's address in Pimlico.

57. In evidence Ms Forsythe said that she could not recall whether she ever received the CDC letter. Mr Brian Bragg, the owner of Narellan, said that he did not have any understanding that the CDC letter should have been forwarded to Ms Forsythe. This is because Mr Bragg explained that he presumed that Ms Forsythe already had the CDC letter, having been sent a copy of it by Ballina Council. The evidence established that Ballina Council did not at any stage send Ms Forsythe a copy of the letter.

58. **CONCLUSION:** From all of this I conclude that Ms Forsythe did not receive a copy of the CDC letter. More importantly I conclude that Ms Forsythe was not specifically informed, as at 4 November 2014, that her pool was not to be used until a Final Occupation Certificate had been issued by Ballina Council.

59. It seems to me that there was ample opportunity for Ms Forsythe to be sent a copy of the CDC letter. Indeed, this opportunity was acknowledged in evidence during the inquest by Rod Willis who was the Group Manager of the Development and Environmental Health Group within Ballina Council at the time of Jake's death. This is because, I gather, the CDC application form specially provided for sections in which the address of the land proposed to be developed (Section 2) and the details of the builder (Section 7) could be nominated. Ms Forsythe's Pimlico address and Narellan's Ballina address were recorded in both sections, respectively. Mr Willis also agreed in evidence it would be a good idea, and in a pool owner's interests, for a pool owner to receive a copy of a letter advising of the issuing of a CDC and for a pool to not be used until such time as a Final Occupation Certificate is granted.

60. During Mr Willis' evidence, reference was made to the fact that since January 2015 Ballina Council had adopted a practice where a letter²⁶, described by Mr Willis as a type of explanatory memorandum, is now sent to pool owners. The purpose of the letter is to draw attention to the fact that both fibreglass pools (for the reasons set out above) and concrete pools (due to the possibility of holding groundwater or rainwater) may contain water in circumstances where such pools are not enclosed by fences in accordance with the Pools Act.

61. This was done to address the inconsistency in the CDC letter which refers to the fact that a pool is not to be filled with water (or occupied or used) until a Final Occupation Certificate is issued. However, as the evidence demonstrated, the filling of a pool with water²⁷ is a common occurrence in practice, and occurs well before a Final Occupation Certificate is issued. A template copy of such a letter was tendered in evidence during the inquest. The template copy is addressed for the attention of both "*pool builders & pool owners*". However, the evidence at inquest was unable to confirm whether the template letter is in practice sent separately to both pool owners and pool builders.

²⁶ Exhibit 3.

²⁷ At least 300mm of water within an excavation, structure or vessel is required before that excavation, structure or vessel is regarded as a swimming pool for the purposes of the *Swimming Pools Act 1992*.

62. **CONCLUSION:** In many cases, like Ms Forsythe's, it appears that applications for a CDC for the construction of a pool are lodged by a pool builder on behalf of a pool owner. This results in the address of the pool builder being regarded as the principal address for correspondence from Ballina Council. Accordingly, when correspondence such as the CDC letter is despatched by Ballina Council there is no assurance that it is received by the pool owner. In Ms Forsythe's case the evidence established that she did not receive the CDC letter because the pool builder, Mr Bragg on behalf of Narellan, incorrectly believed that a copy would be sent separately by Ballina Council to Ms Forsythe's address. The practice of not sending a separate copy of the CDC letter to a pool owner's address is undesirable and may lead to situations where important information is not communicated to a pool owner. In Ms Forsythe's case, she was not directly informed that she was not to use her pool until a Final Occupation Certificate had been issued by Ballina Council.

63. Of course it is impossible to know whether, even if Ms Forsythe had received and read the CDC letter, whether Jake would have been allowed to swim in the pool on 16 January 2015. However, it is in my view important for Ballina Council to have appropriate systems in place where important information relevant to the safety of persons who may use pools is communicated directly to pool owners. Accordingly, I consider that it is necessary to make the following recommendation.

64. **RECOMMENDATION 1:** I recommend to the General Manager of Ballina Shire Council that consideration be given to ensuring that correspondence relating to the granting of a Complying Development Certificate for the construction of a swimming pool, and all conditions relating to such a Certificate, are sent directly to swimming pool owners.

What occurred during the handover process on 8 December 2014?

65. The handover was conducted by Shem Bragg (**Shem**) on behalf of Narellan. The evidence established that the handover involved Shem going through a checklist and questionnaire with Ms Forsythe and explaining the contents of a Pool Owner's Manual (**the Manual**).²⁸ The Manual contains a Client Acknowledgement (**the Acknowledgement**) within which there is a Handover Checklist (**the Checklist**). Item 4 of the Checklist provides: "*I understand that it is my absolute responsibility to maintain the temporary fencing according to Australian Standards and that I must arrange for an inspection of the permanent fence once it is erected*".²⁹ The Acknowledgment was signed by both Ms Forsythe and Mr Bragg on 8 December 2014. Ms Forsythe's signature confirmed that, according to the terms of the Acknowledgment, the items on the Checklist had been explained to her and that she understood them.³⁰

66. There is divergent evidence about what, if anything, was discussed between Shem and Ms Forsythe on 8 December 2014 regarding use of the pool from that day forward. In a statement made to the police following Jake's death, Ms Forsythe said that, following the handover, she was left with the belief that that the pool could be used from 8 December 2014: "*We had a handover and the kids were allowed to swim*".³¹ Ms Forsythe went on to describe the handover in this way: "*On the 8th of December we did a handover – them pretty much saying here's your pool – when you get the other fence up – council will come and check it*".³² In evidence, Ms Forsythe elaborated

²⁸ Exhibit 1 tab 45A at [3], [8].

²⁹ Exhibit 1, tab 45.

³⁰ Ibid.

³¹ Exhibit 1, tab 14 at [5].

³² Exhibit 1, tab 14 at [8].

further. She said that Shem told her that the “*water was OK*” for her children to swim in and that in response she told Shem that she would open the temporary fence to allow the children to do so.

67. Shem’s recollection of the handover is in contrast to Ms Forsythe’s. He denied ever telling Ms Forsythe that she could use the pool before a Final Occupation Certificate was issued by Ballina Council. Shem also said in evidence that Ms Forsythe never asked him when she could start using the pool. In any event, Shem explained in evidence that he verbally made it clear to Ms Forsythe that she could not use the pool until a Final Occupation Certificate had been issued.
68. Shem was asked in evidence about whether the need for a Final Occupation Certificate to be issued before the pool could be used was stipulated in writing in the Acknowledgement. Shem referred to item 4 and expressed the view that this amounted to such a stipulation. With respect, I do not think that item 4 amounts to such a stipulation. It only serves to draw a pool owner’s attention to their responsibility to maintain a temporary fence, and arrange for an inspection once a permanent fence is constructed. Item 3 makes no stipulation regarding use, or non-use, of the pool.

69. **CONCLUSION:** On the evidence available it is not possible to resolve the conflicting evidence regarding what, if anything, was discussed during the handover on 8 December 2014 in relation to use of Ms Forsythe’s pool. However, the difficulty in resolving this issue highlights, in my view, the need for there to be written clarity regarding the question of pool use, rather than reliance on verbal instructions. For avoidance of doubt, important information regarding when a pool is able to be used should be communicated clearly to a pool owner in writing.

70. **RECOMMENDATION 2:** I recommend to Mr Brian Bragg, the owner of Bragg Enterprises Pty Ltd, trading as Narellan Pools Northern Rivers, that consideration be given to including within the Client Acknowledgement of the Narellan Pools Pool Owner’s Manual, explicit written instructions that a pool is not to be used until a Final Occupation Certificate has been issued by a consent authority, a local council, or an accredited certifier.

Should any other recommendations be made?

71. As already discussed above, one of the key issues which the inquest examined was the effectiveness of how certifying authorities, such as local councils, communicate to pool owners, such as Ms Forsythe, particularly in relation to the issue of when pool owners are able to use their pools. The inquest heard evidence from both pool builders and council officers involved in the certification process that in practice there is great temptation for a pool owner to use a pool before a Final Occupation Certificate is issued. As was evident in Ms Forsythe’s case, a period of weeks can sometimes pass between a pool being handed over to a pool owner and the stage where a pool is ready for a final inspection in consideration of the issuing of a Final Occupation Certificate.
72. In such circumstances it seems to me that, as I have already noted above, clear instructions to pool owners regarding the timing of pool use is critical. The Pools Act already provides for instructions relevant to pool safety to be given to owners and users of pools. Section 17 of the Pools Act provides that an occupier of any premises in or on which a pool is situated must maintain warning notices in accordance with the Pools Regulations. Clause 10 of the Pools

Regulations sets out the content of such warning notices stipulating, for example, that a warning notice is to contain the words: “*Young children should be supervised when using this swimming pool*”.

73. **CONCLUSION:** Common sense suggests that a temporary fence without a gate with a self-closing device is inherently less safe than a permanent fence with such a gate. This is plainly one of the reasons why construction of a fence in accordance with the Pools Act is required before a Final Occupation Certificate can be issued. It is also plainly why a pool is not to be used until such a Certificate is issued.

74. As noted above, the Pools Act and Pool Regulations already provide for warning notices relevant to pool safety to be maintained for completed pools. In these circumstances it would seem that there is an opportunity to use similar warning notices relevant to pool safety for pools in the process of construction. In Jake’s case it has been demonstrated that there was no written instructions regarding the timing of pool use to the pool owner, Ms Forsythe, and that any verbal instructions from the pool builder that may have been provided were ineffective. I therefore consider the following recommendation to be necessary.

75. **RECOMMENDATION 3:** I recommend to the Minister for Innovation and Better Regulation that consideration be given to amending the *Swimming Pools Act 1992* and *Swimming Pools Regulation 2008* to provide for warning notices to be erected and maintained during the construction of a swimming pool, which stipulate that a swimming pool is not to be occupied or used until a Final Occupation Certificate by a certifying authority is issued.

Findings

76. Before turning to the findings that I am required to make, I would like to acknowledge and thank Mr Lester Fernandez, Counsel Assisting, and his instructing solicitor, Mr Jamie McLachlan. I am extremely grateful, not only for their valuable insight assistance both before and during the inquest, but also for the compassion and empathy that they have shown throughout the coronial investigation and inquest process. I also thank Detective Senior Constable Andrew Fraser for his efforts during the investigation into Jake’s death and for compiling the initial brief of evidence.
77. The findings I make under section 81(1) of the Act are:

Identity

The person who died was Jake Rhodes.

Date of death

Jake died on 17 January 2015.

Place of death

Jake died at Lady Cilento Children’s Hospital, South Brisbane, Queensland 4101.

Cause of death

Jake died from hypoxic-ischaemic encephalopathy.

Manner of death

Jake's death was due to misadventure when he was involved in a near-drowning incident in a backyard swimming pool at Pimlico, NSW on 16 January 2015.

Epilogue

78. The risk of a child drowning, whether it be in a swimming pool, in the ocean, or in any body of water, is an ever-present one which we, as community, must be constantly mindful of, and be vigilant against. Any improvements which can be made to water safety awareness can only serve to protect and safeguard our children from such risks.
79. On behalf of the Coroner's Court, and the counsel assisting team, I offer my deepest and most respectful condolences to Ms Rhodes; Mr Rhodes; Lani, Roy and Kayla; and all of Jake's family for their tragic loss.
80. I close this inquest.

Magistrate Derek Lee
Deputy State Coroner
27 February 2018
NSW State Coroner's Court, Glebe